2-27-2014

Nix v. Elmore County Clerk's Record v. 2 Dckt. 41524

Vol 2 of V

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

S.C. #41524

CHERRI LYNN NIX
Plaintiff /Appellant

vs.

ELMORE COUNTY, a Political Subdivision of the State of Idaho
Defendant / Respondent

CLERK'S RECORD ON APPEAL

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Elmore.

Kirtlan G. Naylor,
Naylor & Hales, P.C.,
Attorney for Respondent

E. Lee Schlender
Schlender Law
Attorney for Appellant

VOLUME II of III

41524

IN THE SUPREME COURT OF THE

STATE OF IDAHO

CHERRI LYNN NIX, Plaintiff-Appellant, v. ELMORE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant-Respondent.	SUPREME COURT NO. 41524 VOLUME II

Appeal from the Fourth Judicial District, Elmore County, Idaho

HONORABLE LYNN G. NORTON, presiding,

E. Lee Schlender, 2700 Holly Lynn Drive, Mountain Home, Idaho 83647

Kirtlan G. Naylor, Naylor & Hales, 950 W. Bannock Street, Suite 610, Boise, Idaho 83702

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO

Defendant.

Case No. _2012-1213

Plaintiff's Reply Brief

PARTIAL SUMMARY JUDGMENT

THE ADMINISTRATIVE PROCEDURES ACT HAS NO APPLICATION TO THIS CASE

Elmore County asserts the Idaho Administrative Procedures Act (APA) requirement of a 28-day notice of review is mandated, citing I.C. 31-1506. That section addresses payment of claims presented to the county commissioners as per a "list of all bills and accounts"; the county treasurer is to only issue warrants for bills so listed. This bill-paying statute does not circumscribe the law of wrongful discharge.

The Elmore County Board of Commissioners is not an agency, which for all purposes, has its decisions controlled by Chapter 52, Title 67 of the Idaho Code. (APA) . *Jones v. Home Federal Bank*, WL 996476 (Not reported in F.supp.2d D.Idaho 2010.) See, *Petersen v. Franklin County*, 130 Idaho 176,

938 P.2d 124 (1997); *Arthur v. Shoshone County*, 133 Idaho 854, 993 P.2d 617;

" A county board of commissioners does not fall within the definition of an 'agency' for purposes of applying the APA in its totality."

It does act as an agency when mandated to do so by a statutory scheme, such as Hospitals for Indigent Sick, Title 31,Chapter 35 Idaho Code. *Intermountain Health Care, Inc. V. Board of County Commissioner of Blaine County*, 107 Idaho 248, 688 P.2d 260 (1984). The Administrative Procedures Act (APA) requires rules by agencies such as the public utilities commission. The legislative reason for adopting the APA was "to require administrative agencies to make available information concerning their *internal functioning's. Williams v. State*, 95 Idaho 5, 501 P.2d 203 (1972). There is no reported case in Idaho holding that wrongful termination cases are subject to Idaho Administrative Procedures Act requirements in any manner regardless of dicta quoted by Elmore County. Even if APA affords an alternative remedy, the constitutional right to a jury trial cannot be impaired. As stated in Jones, supra:

> " Defendant's contend, without supporting case law or clear statutory language, that a jury trial is not available for claims under the Idaho Whistleblower Act....To the contrary, the Idaho Supreme Court as noted that issues of fact in actions under the Idaho Whistleblower Act are to be resolved by a jury. See Van, 147 Idaho 561 *citing Smith* 140 Idaho 900; See also Curlee v. Kootenai County Fire and Rescue, 224 P.3d 458, 2008 WL 459 5239 (Idaho October.16, 2008.)"

Curlee is now reported at 148 Idaho 391, 224 P.3d 458 .

As stated in *Lubcke v. Boise City /Ada County Housing Authority*, 124 Idaho 450, 860 P.2d 653 (1993):

"In cases sounding in law, the parties have the right to have the facts determined by a jury. "

Idaho Const. art. 1, § 7; *David Steed and Assocs. v. Young*, 115 Idaho 247, 250, 766 P.2d 717, 720 (1988)."

Once the Court defines public policy, the question of whether it has been violated is one for a jury. *Smith v. Mitton*, 140 Idaho 893, 104 P.3d 367 (2004).

Wrongful termination is a violation of public policy protecting a valuable property right. *Van v. Portneuf Medical Center*, 147 Idaho 552 , 212 P.3d 982 (2009).

I.C. 67-5277 states "Judicial review shall be conducted without a jury." A statute cannot abolish a Constitutional right nor should the Court be asked to so interpret the Administrative Procedures Act as doing exactly that.

Elmore County does not provide in its ordinances and rules including the County Personnel Policy that judicial review must be requested as per APA; in the absence of such guidelines, even in administering statutory programs such as the Medical Indigency Act there are no specific deadlines for requesting a hearing. *University of Utah Hospital v. Minidoka County*, 120 Idaho 91, 813 P.2d 902.

The case is controlling for another obvious reason; Nix states in her complaint (agreed upon by Elmore County) that she was *denied any hearing*; she was denied the "Pre-Deprivation" hearing :

> " The personnel policy of Elmore County establishes the right for full-time regular and part-time employees to a hearing prior to any final decision on discharge, demotion with attendant change in pay, or suspension without pay".

Employee Manual, Page 20.

The Board of Commissioners refused to grant her a hearing :

" The Elmore County Board of Commissioners will not engage in an evidentiary hearing on June 12, 2012."

Prosecuting Attorney letter to attorney Grant Burgoyne, Exhibit H to Nix Affidavit.

" Ms. Nix shall not be entitled to a hearing to consider the merits of her termination as she was a probationary employee and as such, she is not entitled to a hearing upon termination".

Elmore County Commissioners Decision June 18, 2012, Exhibit I to Nix Affidavit.

Where there has been a denial of a request for a hearing by a county, APA is not applicable; there was no hearing and no "contested case".

University of Utah states the rule:

" A careful reading of the provisions of I.C. § 67-5215 clearly leads to the conclusion that the statute contemplates and requires a "final decision" in a "contested case" prior to implementation of the thirty-day time requirement for seeking judicial review. Further, the board of commissioners' February 27, 1989 order ***was simply a denial of the hospital's request for a hearing.*** Although an application for medical indigency assistance was filed pursuant to I.C. § 31-3504, there had never been a "contested case" or a "final decision" as contemplated by I.C. § 67-5215. We are aware of the unusual and protracted proceedings which followed the initial filing of an application by the hospital, however, a careful study of the records of all of the appeals and proceedings in these cases reveal that *there has never been a determination by the board of county commissioners that constitutes a "final decision" in a "contested case" wherein the merits of the applications for payment of medical services have been directly addressed and resolved.* Inasmuch as I.C. § 31-3505 does not provide any time limitation or deadline upon an applicant's request for a hearing after denial of its application, and considering that I.C. § 67-5215(b) expressly provides that there be a "final decision" in a "contested case" before the thirty-day time requirement within which to seek judicial review is imposed, we hold that the hospital is entitled to a hearing on its applications as requested on December 28, 1984. " (emphasis added).

Elmore County appended to it's brief a decision of Hon. Patrick. H. Owen dated September 13, 2011. Judge Owen in citing *Gibson v. Ada County*, 142 Idaho 746, 133 P.3d 1211 (2006) ruled :

> " The Supreme Court in *Gibson II* stated that Idaho Code Sec.31-1506 did not apply because the statute expressly applies to board "action" not inaction".

The reasoning is not complicated; refusing to hold a hearing produces nothing for the district court to review; there is no record on appeal :

> " In the absence of a hearing before the Board of County Commissioners, no record could be made, no findings of fact could be entered and no record could be made upon which a district court could conduct its review under the statute."

University of Utah Hospital v. Minidoka County, 115 Idaho 409, 767 P.2d 249 (1987).

ASSERTIONS OF AT-WILL STATUS ARE IRRELEVANT.

Elmore County repeatedly stresses that Nix as an at-will employee had no right to a Pre-Deprivation Hearing. This assertion is contrary to the plain language of the Personnel Policy :

> " The personnel policy of Elmore County establishes the right for full-time regular and part-time employees to a hearing prior to any final decision on discharge. "

In the same section, entitled "Appeal Hearing (Pre-Deprivation)" at page 20 of the manual are stated the "elements of procedure" for the hearing, which includes a notice of charges, a record to be maintained and the right to legal counsel:

> " The purpose of the hearing shall be to provide the employee an opportunity to present evidence and to rebut the information upon which the proposed personnel action is based."

Nowhere in the Policy does it state disciplinary probation extinguishes the "established right" to a hearing :

> " When public employees have a protected property interest in their employment, the due process clause requires that, prior to termination, the employees be given: a) oral or written notice of the reason(s) for the termination, b) an explanation of the employer's evidence, and c) an opportunity to present their side of the story. "

Lubcke v. Boise City /Ada County Housing Authority, 1234 Idaho 450. Citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532.

Elmore County argues that the *disciplinary probation notice* established that Nix was at-will as an employee :

" ...Plaintiff's attempt at distinguishing these two types of probation is irrelevant because *Plaintiff's notice of her one-year disciplinary probation* clearly states that part of the conditions of her probation were that Plaintiff was, and would remain, an at-will employee and could be immediately terminated at any time during the one-year probationary period." (emphasis added).

Defendants Memorandum, page 20.

Nope; cannot be done. Even where there is no written agreement a uniform reasonable notice of changes in employment agreements must be given by the Employer:

"In the absence of a written agreement, this Court has held that an *employer* may unilaterally change the employment agreement by uniformly providing reasonable notice of the change to its affected employees; the employees accept by continuing to work following receipt of such notice. *Watson v. Idaho Falls Consolidated Hospitals, Inc.*, 111 Idaho 44, 48, 720 P.2d 632, 636 (1986); *Parker v. Boise Telco Fed. Credit Union*, 129 Idaho 248, 254, 923 P.2d 493, 499 (Ct.App.1996)."

Bollinger v. Fall River Rural Electric, Co-op., Inc. 152 Idaho 632, 272 P3d 1263.

It is axiomatic the notice authored by supervisor Vence Parsons cannot change the status of Nix to deprive her of an agreed-upon covenant, the right to a hearing; only the county commissioners have that authority; Elmore County is the *employer*. The "Notice of Last Chance" attempt to deprive Nix of her hearing is prohibited by the express language of the Personnel Policy:

" Only the Elmore County Board of Commissioners has authority to establish general policy for Elmore County Employees. *The terms and conditions set forth in this policy, and in the resolutions and policy statements which support it, cannot be superseded by any other official's commitment, without the express written agreement of the Board of Commissioners.* That is particularly true for terms and conditions that would establish a financial obligation for Elmore County now or in the future. It is important that all employees understand the relationship between policy adopted by the Board of Commissioners and department policy implemented by other elected officials." (emphasis added).

Personnel Policy, Page 7; exhibit A to Affidavit of Barbara Steele.

Enough said. Admittingly belaboring the point: a full-time employee on disciplinary probation is vested with the agreed-upon *right to a hearing* prior to discharge.

As stated in *Wesco Auto Body Supply, Inc. v. Ernest*, 149 Idaho 881, 243 P3d 1069;

> "Idaho law recognizes a cause of action for breach of an implied covenant of good faith and fair dealing. *Such a covenant is found in all employment agreements, including employment at-will relationships."* Cantwell v. City of Boise, 146 Idaho 127, 135, 191 P.3d 205, 213 (2008) (internal citation omitted). The determination of whether the covenant has been breached is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions. Jenkins, 141 Idaho at 243, 108 P.3d at 390. "An action by one party that violates, qualifies or

> significantly impairs *any benefit or right of the other party under an employment contract whether express or implied, violates the covenant.*" **1080 *892 Cantwell, 146 Idaho at 135–36, 191 P.3d at 213–14. However, the "covenant only arises in connection with the terms agreed to by the parties, and does not create new duties that are not inherent in the employment agreement." Van v. Portneuf Med. Ctr., 147 Idaho 552, 562, 212 P.3d 982, 992 (2009)."

Elmore County confuses two judicial concepts; an agreement between the employee and *employer* that in law and fact over-rides at-will status of employment, and the due process right to a pre-termination hearing not only afforded, but mandated by the County. The later is not dependent upon employee status to be enforced:

> " Idaho law recognizes a cause of action for breach of an implied covenant of good faith and fair dealing, *which is found in all employment agreements, including at will employment relationships. Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242-43, 108 P.3d 380, 389-90 (2005). The covenant of good faith and fair dealing is *a judicially created exception to the employment at-will doctrine based on a contractual duty of good faith.* "

Crea v. FMC Corp., 135 Idaho 175, 179, 16 P.3d 272, 276 (2000). (emphasis added)

Any action that violates, nullifies, or significantly impairs *any benefit or right* that either party has in the employment contract, whether express or implied, is a violation of the covenant. Metcalf v. Intermountain Gas Co., 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). However, ' the covenant 'does not create a duty for the employer to terminate the at-will employee only for good cause.' The covenant simply requires that the parties perform in good faith the obligations

imposed by their agreement. *Jenkins*,141 Idaho at 243, 108 P.3d at 390 (citation omitted) (quoting *Metcalf*, 116 Idaho at 627, 778 P.2d at 749) (citing *Thompson v. City of Idaho Falls*, 126 Idaho 587, 593, 887 P.2d 1094, 1100 (Ct.App.1994)). " (emphasis added).

Prado v. Potlatch Corp. (D.Idaho 2006) WL 2597870.

The Personnel Policy is unequivocal; full-time employees have the right to a Pre-Deprivation hearing . The written decision of the commissioners denying Nix a hearing was a violation of their own policy.

Metcalf v. Intermountain Gas Co., 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). *Mitchell*, 125 Idaho at 712, 874 P.2d at 523;
Moser v. Coca-Cola Northwest Bottling Co., 129 Idaho 708, 931 P.3d 1227 (1997).

Elmore's argument here is identical to that made in Sommer v. Elmore County, F. Supp.2d---2012 WL 4523449. Hon. Ronald E. Bush United States Magistrate for the District of Idaho surgically dissected Elmore County's arguments, quoting statements made in their brief:

> " *Defendants' counsel argued at the hearing that, regardless of whether Sommer is considered a "regular" full-time employee, as an at-will employee she has no property right in continued employment and, thus, no basis for a due process challenge. Defendants' briefing, and the record of Sommer's employment, suggests otherwise.* Defendants repeatedly refer to the hearing provided to regular employees and even refer to it as a "right" or "guarantee" for those employees. (" Sommer was a probationary at-will employee at the time of her termination, and the County's Personnel *Policy only extends the opportunity for a pre-deprivation appeal to full-time* and part-time *regular employees* .") (internal citations omitted; emphasis added); ("In the ... Policy, *the only limitation on the at-will*

> *employment relationship is that full-time regular* and part-time regular employees *may request a pre-deprivation appeal hearing* before termination. This hearing is available to regular employees 'prior to any final decision on discharge, demotion with attendant change in pay, or suspension without pay.' ") ("Sommer's termination was proper because she was a probationary employee, and *was not a Full-Time Regular employee , otherwise provided a pre-termination hearing.*") (emphasis added); Defs.' Reply, p. 2 ("In Elmore County, full-time regular employees through the Personnel Policy are afforded a pre-deprivation hearing upon notice of termination (if the employee requests it). Sommer, while a full-time employee, was a probationary, and not a 'regular' employee and had no such hearing right.") (internal citations omitted); *Id.*, p. 5 (the Policy "only guarantees hearings to full time regular employees "). Thus, Defendants' briefing indicates that there may be some limitation on the at-will employment relationship, at least with respect to "regular" employees, who have right to pre-termination appeal hearing. *See* Reply, pp. 4–5 (Dkt. 21); Defs.' Memo., p. 4 (Dkt. 19–1) ("In the ... Policy, the only limitation on the at-will employment relationship is that full-time regular and part-time regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees .").
> (some internal cites to Elmore's brief omitted for ease of reference.)

Sommer v. Elmore County, supra. Attached to Plaintiff's first Brief herein. (emphasis added).

Playfair v. South Lemhi School District 292 Board of Trustees (Not Reported in F.Supp.2d 2010 WL 1138958 (D.Idaho) presented a similar situation; a schoolteacher was denied a pre-termination hearing. Hon. B. Lynn Winmill, Chief Judge ruled that constituted a constitutional injury requiring a remedy:

"...the Court faced the difficult decision of how to fashion an equitable remedy 'to ensure Playfair is afforded due process and the public's interest is not harmed.' The court concluded that the most equitable remedy was :

"Allow the Board to render a decision after providing Playfair a full and fair opportunity to be heard."

The parties then presumably settled the case reserving the right to petition the Court for attorney fees and costs. The Court undertook an exhaustive analysis of case law and concluded that Playfair was entitled to her attorneys fees in the sum of $14, 676.45 since she prevailed to the extent that the Board was required to hold :

> "...fair hearing at which Playfair would have the opportunity to be heard....Playfair was not required to achieve the exact relief she sought in order to be eligible for attorney fees under Sec. 1988....Defendants now argue that Playfair received the requisite pre-termination notice and hearing after remand by the Court."

The Court concluded that :

> "Playfair obtained a judicial determination that Defendants likely violated her due process rights, and a judicial order requiring Defendants to hold a fair and unbiased hearing and Playfair would be given an opportunity to be heard. Twenty-two days later, Plaintiff received the fair hearing that she sought. Accordingly, Playfair's legal success was not merely 'technical'."
>
> (A copy of *Playfair v. South Lemhi School District* 292 *Board of Trustees* is appended to this brief.)

CONCLUSION

Elmore County agrees that paragraph 13 of Plaintiff's Statement of Undisputed Facts is undisputed. That paragraph states:

> "Elmore County Commissioners held a meeting on June 11, 2012 and issued a written decision on June 18, 2012 confirming Plaintiff's termination. She was never given any pre-deprivation procedure, or a list of the charges. Plaintiff was denied any hearing at to the reasons for her termination or an opportunity to respond to any charges against her."

As a matter of law Plaintiff Cherri Nix is entitled to an Order of Partial Summary Judgment that her termination was a wrongful discharge. She is entitled to recover her back salary and benefits without delay. Upon application with supporting affidavit the Court can determine attorney's fees and costs to be awarded ; Idaho statutory law is not more restrictive than Sec.1983; 1988. The prevailing party in an action brought for breach of an employment contract is entitled to an award of fees under § 12–120(3), on the basis that an employment contract constitutes a contract for the purchase or sale of service. *Clark v. State, Dept. of Health and Welfare,* 134 Idaho 527, 5 P.3d 988 (2000); *Atwood v. Western Const. Inc.,* 129 Idaho 234, 237, 923 P.2d 479, 482 (Ct.App.1996) ; *Jenkins v. Boise Cascade Corp.* 141 Idaho 233, 108 P.3d 380 (2005).

Dated this 11 day of March, 2013.

E. Lee Schlender, Attorney for Plaintiff Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 11 day of March, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit: PLAINTIFF'S REPLY BRIEF RE: MOTION FOR PARTIAL SUMMARY JUDGMENT
to the Attorneys for Elmore County:
Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702
BY THE FOLLOWING METHOD:
FAX : 383-9516

E. Lee Schlender

Not Reported in F.Supp.2d, 2010 WL 1138958 (D.Idaho)
(Cite as: 2010 WL 1138958 (D.Idaho))

H
Only the Westlaw citation is currently available.

United States District Court,
D. Idaho.
June L. PLAYFAIR, Plaintiff,
v.
SOUTH LEMHI SCHOOL DISTRICT 292 BOARD OF TRUSTEES; Von Bean, a board member; James Whittaker, a board member; Carl Lufkin, a board member; Ross Goddard, a board member; and Deb Foster, a board member, Defendants.

No. CV09-375-BLW.
March 20, 2010.

Bron M. Rammell, Dial May & Rammell, Pocatello, ID, for Plaintiff.

Brian K. Julian, Anderson Julian & Hull, Boise, ID, for Defendants.

MEMORANDUM DECISION AND ORDER
B. LYNN WINMILL, Chief Judge.

*1 Before the Court is Plaintiff June Playfair's Petition for Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988, F.R.C.P. 54(d) and Local Rule 54.2 (Docket No. 22). For the following reasons, the Court grants the Petition.

BACKGROUND

Playfair commenced this action, alleging violations of state statutes and of her federal and state procedural due process rights and seeking to enjoin a scheduled hearing regarding the non-renewal of her contract with South Lemhi School District No. 292. *Verified Complaint for Injunctive Relief* (Docket No. 1-2). Specifically, Playfair alleged that the defendant School Board members ("Defendants") could not fairly preside over her non-renewal hearing, originally scheduled for August 4, 2009, because Defendants previously decided to terminate her employment at a board meeting on May 11, 2009. *Id.* Playfair sought relief in the form of "a temporary restraining order, as well as preliminary and permanent injunctive relief preventing the School Board and its individual Board members from sitting and participating as decision makers in the nonrenewal proceedings noticed against Plaintiff, Playfair." *Id.* at p. 4.

Playfair filed this action for injunctive relief in state court, *id.*, and Defendants removed the case to federal court. *Notice of Removal* (Docket No. 1). Playfair then a filed Motion for Temporary Restraining Order and/or Preliminary Injunction. *Plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction* (Docket No. 2). On August 4, 2009, the Court granted Playfair's Motion for Temporary Restraining Order. *Order* (Docket No. 5). The Court held an evidentiary hearing on Playfair's Motion for Preliminary Injunction on August 10, 2009, and granted that motion on August 12, 2009. *Memorandum and Order Re: Motion for Preliminary Injunction* (*"Preliminary Injunction Order"*) (Docket No. 16).

In the decision granting Playfair's Motion for Preliminary Injunction, the Court found "that the Board voted to terminate ... [Playfair's] position on May 11, 2009, and [Playfair] is thus likely to succeed on her due process claims." *Id.* at p. 11. Consequently, the Court ordered Defendants to set aside the nonrenewal of Playfair's contract. *Id.* at p. 19.

After finding that Playfair suffered a "constitutional injury," the Court faced the difficult decision of how to fashion an equitable remedy "to ensure [Playfair] is afforded due process and the public's interest is not harmed." *Id.* at p. 13. Determining the appropriate remedy was especially challenging given that Leadore, the town in which Playfair taught, is a small farming community with less than 150 citizens. *Id.* at 3, 16. Ultimately, the Court decided that the most equitable remedy was to "allow[ ] the Board to render a decision after providing [Playfair] a full and fair opportunity to be heard." *Id.* at p. 15. The Court cautioned Defendants that it would be "incumbent on each of [them] to assess their own state of mind and satisfy themselves that they can be open-minded and fair," and that "[I]f any of them have any doubt that they can do that ... it would be their duty to recuse themselves from participation in the due process hearing." *Id.* at p. 17. Pursuant to this remedy, the Court ordered that Defendants be "enjoined from enforcing the Superintendent's recommendations of

non-renewal of [Playfair's] contract" until Defendants could hold a "fair hearing at which [Playfair would have] the opportunity to be heard and the Board of Trustees [could] reach a fair and reasoned decision based on all of the evidence." *Id.* at p. 19.

*2 On October 21, 2009, the parties filed a Stipulation for Dismissal, (Docket No. 19), and the Court entered an Order for Dismissal that same day, (Docket No. 20). Because the parties each contend that they are the prevailing party, *Stipulation for Dismissal*, p. 2 (Docket No. 19), they reserved the right to petition the Court for attorney fees and costs, *Order for Dismissal* (Docket No. 20).

ANALYSIS

Each party contends that it is the "prevailing party" in this action. *Brief in Support of Plaintiff's Request for Attorney's Fees Pursuant to 43 U.S.C. § 1988, F.R. C.P. 54(d) and Local Rule 54.2* (*"Plaintiff's Petition"*), pp. 3–9 (Docket No. 22–1); *Response to Plaintiff's Petition for Attorney Fees Pursuant to 42 USC § 1988, FRCP 54(d) and Local Rule 54.2* (*"Defendants' Response"*), p. 4 (Docket No. 23). Playfair contends that she is entitled attorney fees and costs totaling $14,676.45. *Reply Brief in Support of Plaintiff's Request for Attorney's Fees Pursuant to 42 U.S.C. § 1988, F.R. C.P. 54(d) and Local Rule 54.2* (*"Plaintiff's Reply"*), p. 2 (Docket No. 24). Defendants contend that they are the prevailing part, but if the Court finds that Playfair is the prevailing party, her attorney fees are unreasonable and should be reduced. *Defendants' Response*, pp. 8–13 (Docket No. 23).

A. Prevailing Party

Pursuant to 42 U.S.C. § 1988(b), a court may award reasonable attorney fees and costs to "the prevailing party" in an action to enforce a provision of 42 U.S.C. § 1983. 42 U.S.C. § 1988(b). Playfair's claim seeking to protect her federal due process rights through injunctive relief was appropriately raised under § 1983. *See Matsuda v. City & County of Honolulu*, 512 F.3d 1148, 1156 (9th Cir.2008) ("[T]he Due Process Clause may give rise to a claim under § 1983.").

"The touchstone of the prevailing party inquiry [is] the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in" § 1988. *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). "If the plaintiff has succeeded on 'any significant issue in litigation which achieve [d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791–92 (citation omitted) (alternation in original). A party is not required to "succeed on the 'central issue' in the litigation [nor] achieve the 'primary relief sought' to be eligible for an award of attorney's fees under § 1988." *Id.* at 784; *see also Id.* at 790 ("[T]he 'central issue' test ... is directly contrary to the thrust of our decision in *Hensely*."); *Id.* at 791 ("In sum, the search for the 'central' and 'tangential' issues in the lawsuit, or for the 'primary,' as opposed to the 'secondary,' relief sought, much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988 and is essentially unhelpful in defining the term 'prevailing party.' "). However, "[w]here the plaintiff's legal success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that" the standard for achieving "prevailing party" status has not been met. *Id.* at 792.

*3 Guided by this framework, the Court finds that Playfair is the prevailing party in this action. Playfair, through her § 1983 action against Defendants, materially altered the legal relationship between herself and Defendants, succeeded on a significant issue in litigation, and achieved some of the benefit she sought when bringing suit. The legal relationship between Playfair and Defendants was materially altered when the Court set aside Defendants' non-renewal of Playfair's contract and ordered Defendants to hold a "fair hearing at which [Playfair would have] the opportunity to be heard." *Preliminary Injunction Order*, p. 19 (Docket No. 16). The Court's order caused Defendants to alter their process for making non-renewal decisions and, with regards to Playfair, to start the process anew without violating her rights to due process.

Playfair also succeeded on a significant issue in litigation—whether Defendants terminated her position at the May 11, 2009 board meeting. Playfair alleged that Defendants accepted the Superintendent's recommendation not to renew her contract at the May 2009 board meeting, *Verified Complaint for Injunctive Relief*, ¶ 6 (Docket No. 1–2), whereas Defendants contended that they only "voted to accept the Super-

intendent's recommendation to hold a *hearing*." *Affidavits of Lufkin, Whittaker, Goddard, & Von Bean*, ¶ 7 (Docket Nos. 25–2, 25–4, 25–5, and 25–6, respectively) (emphasis added). Agreeing with Playfair, the Court found "that the Board voted to terminate ... [Playfair's] position on May 11, 2009." *Preliminary Injunction Order*, p. 11 (Docket No. 16).

Finally, Playfair achieved some of the benefit she sought when bringing this action. Playfair sought "an administrative hearing where the decision makers have not prejudged or prematurely decided any issues that will be presented at the hearing." *Verified Complaint for Injunctive Relief*, ¶ 16 (Docket No. 1–2). Due to Playfair's perception that Defendants had already made up their minds regarding the non-renewal of her contract, she specifically requested "injunctive relief preventing [Defendants] from sitting and participating as decision makers" at the hearing regarding the non-renewal of her contract. The Court granted Playfair's request for a non-biased administrative hearing by ordering Defendants to hold "a fair hearing" and "reach a fair and reasoned decision based on all the evidence." *Preliminary Injunction Order*, p. 19 (Docket No. 16). Defendants do not argue that they acted as biased decision makers at the subsequent non-renewal hearing. *Defendants' Response* (Docket No. 23). In fact, Defendants rely on language in the Court's preliminary injunction order finding that none of them "questioned [Playfair's] teaching abilities, had unfavorable impressions of her, or harbored a personal bias against her." *Id.* at 4 (quoting *Preliminary Injunction Order*, p. 16 (Docket No. 16)).

Thus, as a result of her § 1983 action against Defendants, Playfair was awarded a fair and unbiased administrative hearing, just as she requested. The fact that Defendants sat as the decision makers at that hearing, contrary to Playfair's request for relief, does not negate the fact that Playfair achieved some, if not most, of the benefits she sought in bringing suit. Playfair was not required to achieve the exact relief she sought in order to be eligible for attorney fees under § 1988(b).

*4 Defendants' argument that Playfair is not entitled to attorney fees under § 1988(b) because she suffered no constitutional violation and "only prevailed on a state statutory basis" is without merit, *see Defendants' Response*, pp. 5–6 (Docket No. 23), because the Court found that Playfair suffered a "constitutional injury." *Preliminary Injunction Order*, p. 13 (Docket No. 16).[FN1] Because Playfair prevailed on her § 1983 claim, not on a state statutory basis, she is entitled to seek attorney fees pursuant to § 1988(b).

FN1. Although there was never a final judicial determination on the merits that Defendants violated Playfair's due process rights because this action never proceeded past the preliminary injunction stage, the Court's order was based on the likelihood that Playfair would succeed on her constitutional claim. *Preliminary Injunction Order*, p. 11 (Docket No. 16) ("[Playfair] is thus likely to succeed on her due process claims."). The Court did not base its decision on state statutory grounds. *See id.* Moreover, the Court implicitly found that Defendants violated Playfair's rights to due process when it set aside Defendants' decision regarding the non-renewal of Playfair's contract. *See id.* at p. 19.

Moreover, the Court finds that Defendants are estopped from arguing that Playfair "received all the process she was due" at the May 11, 2009, board meeting. *See Defendants' Response*, p. 6 (Docket No. 23); *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir.2001) (explaining that judicial estoppel "precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position"). In previous affidavits, Defendants stated that at the May 11, 2009, board meeting, they voted only to accept the Superintendent's recommendation to hold a hearing regarding the non-renewal of Playfair's contract. *Affidavits of Lufkin, Whittaker, Goddard, & Von Bean*, ¶ 7 (Docket Nos. 25–2, 25–4, 25–5, and 25–6, respectively); *see also Preliminary Injunction Order*, p. 11 n. 1 (Docket No. 16) ("Because [D]efendants contend that [Playfair's] position was not terminated at the May 11, 2009 board meeting, they do not argue that the brief May 11, 2009 executive session at which [Playfair] was given approximately five to ten minutes notice that she could speak on her behalf served as a pre-termination hearing ...."). In contrast, in response to Playfair's petition for attorney fees, Defendants now argue that Playfair received the requisite pre-termination notice and hearing at the May 11, 2009, board meeting. *De-*

fendants' Response, p. 6 (Docket No. 23). These positions are inconsistent and, thus, the Court will not entertain Defendants' argument that Playfair "received all the process she was due" at the May 11, 2009, board meeting.

Defendants also argue that Playfair's success in obtaining a preliminary injunction was a "technical victory" that "does not constitute prevailing party status" because Playfair's success "merely postponed the non-renewal hearing until 22 days after originally scheduled." *Defendants' Response*, p. 8 (Docket No. 23). In support of this argument, Defendants cite *Sole v. Wyner*, 551 U.S. 74, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007). *Defendants' Response*, pp. 7–8 (Docket No. 23). In *Sole*, the plaintiff gained a preliminary injunction after an abbreviated hearing, but was denied a permanent injunction after a dispositive adjudication on the merits. *Sole*, 551 U.S. at 77–80. The Supreme Court held that "a final decision on the merits denying permanent injunctive relief ordinarily determines who prevails in the action for purposes of § 1988(b)," and "if, at the end of the litigation, [the plaintiff's] initial success is undone and [the plaintiff] leaves the courthouse emptyhanded," then the plaintiff cannot recover attorney fees pursuant to § 1988. *Id.* at 78.

*5 Here, unlike the plaintiff in *Sole*, Playfair was never denied a permanent injunction after a dispositive adjudication on the merits. Moreover, Playfair's success in obtaining the preliminary injunction was never "undone," and she did not "leave the courthouse emptyhanded." Instead, Playfair obtained a judicial determination that Defendants likely violated her due process rights, and a judicial order requiring Defendants to hold a fair and unbiased hearing at which Playfair would be given an opportunity to be heard. Twenty-two days later, Plaintiff received the fair hearing that she sought. Accordingly, Playfair's legal success was not merely "technical."

B. Amount of Award

Playfair petitions the Court for an award of attorney fees and costs totaling $14,676.45.[FN2] *Plaintiff's Reply*, p. 2 (Docket No. 24). Defendants argue that the Memorandum Decision and Order–Page 11 amount awarded should be reduced because: (1) Playfair prevailed only on state statutory claims, not on her § 1983 action, *Defendants' Response*, p. 10 (Docket No. 23); (2) Playfair obtained only limited success, which did not confer any public benefit, *id.* at p. 11, 12; and (3) Playfair did not obtain excellent results, *id.* at p. 12. Defendants do not contend that the hourly fee rate of Playfair's attorney is unreasonable, or that Playfair's attorney expended an unreasonable amount of time working on this case.[FN3] For the following reasons, the Court awards Playfair $14,539.95 in attorney fees and costs, pursuant to § 1988(b).

FN2. Playfair originally requested an award of $15,144.45. *Affidavit of Bron Rammell in Support of Plaintiff's Petition for Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988, F.R. C.P. 4(d) and Local Rule 54.2* (*"Rammell Affidavit"*), ¶ 8 (Docket No. 22–2). After realizing that she inadvertently included $468 of non-compensable fees, Playfair reduced her request to $14,676.45. *Plaintiff's Reply*, p. 2 (Docket No. 24). However, in making the original calculation, Playfair miscalculated the attorney fees. *See Rammell Affidavit*, ¶ 5 (miscalculating $195 per hour multiplied by 71.9 hours, reaching a total of $14,157.00, instead of $14,020.50).

FN3. Defendants did point out that Playfair's attorney included $468 of costs and fees that should not be compensable. *Defendants' Response*, pp. 9–10 (Docket No. 23). As explained in the preceding footnote, Playfair acknowledged this mistake and accordingly reduced the amount for which she petitions the Court. Beyond this mistake, Defendants do not contend that the amount of hours Playfair's attorney spent on this case is unreasonable. *See id.*

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The resulting number is frequently called the "lodestar" amount. *City of Riverside v. Rivera*, 477 U.S. 561, 568, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986). In determining a reasonable hourly rate, the Court considers the "experience, skill and reputation of the attorney requesting fees," *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir.1996), as well as "the prevailing

market rates in the relevant community," *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

Once the lodestar amount is determined, the Court "then assesses whether it is necessary to adjust the presumptively reasonable lodestar figure on the basis of the *Kerr* factors that are not already subsumed in the initial lodestar calculation." FN4 *Morales v. City of San Rafael*, 96 F.3d 359, 363–64 (9th Cir.1996) (footnote omitted). "There is a strong presumption that the lodestar figure represents a reasonable fee. Only in rare instances should the lodestar figure be adjusted on the basis of other considerations." *Id.* at 363 n. 8 (internal quotation marks and citation omitted).

FN4. The *Kerr* factors are:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.
>
> *Morales*, 96 F.3d at 363 n. 8 (quoting *Kerr v. Screen Guild Extras, Inc.*, 526 F.2d 67, 70 (9th Cir.1975)).

Here, Playfair's attorney submitted affidavits and supporting evidence explaining that his hourly rate is $195 per hour; such hourly rate is reasonable and consistent with similarly qualified attorneys in the area; he has been in practice for over fifteen years; he expended 69.5 hours working on this case; his paralegal's hourly rate is $75 per hour; his paralegal expended 0.2 hours working on this case; and the costs of the case totaled $972.45. *Rammell Affidavit*, ¶¶ 2–3, Exh. A (Docket 22–2); *Supplemental Affidavit of Bron Rammell*, ¶ 6 (Docket No. 24–1) (incorporating "the factual statements in Plaintiff's Reply Brief regarding inadvertently including attorney's fees which should not be and were not intended to be claimed in this case"). Making the appropriate calculations, the Court concludes that the lodestar amount in this case is $14,539.95. The Court further concludes that the present case is not a "rare" case requiring the lodestar amount to be adjusted using the *Kerr* factors.

*6 Defendants' argument that the attorney fee award should be reduced because Playfair prevailed only on state statutory claims, not on her § 1983 action, lacks merit. *See Defendants' Response*, p. 10 (Docket No. 23). As explained above, Playfair prevailed on her § 1983 claim and, thus, is entitled to seek attorney fees pursuant to § 1988(b).

Defendants' argument that the attorney fee award should be reduced because Playfair obtained only limited success and the result of this case did not confer any public benefit is also without merit. *See id.* at p. 11, 12. In support of this argument, Defendants cite *McCown v. City of Fontana*, 565 F.3d 1097 (9th Cir.2009), which held that "attorney's fees awarded under 42 U.S.C. § 1988 must be adjusted downward where the plaintiff has obtained limited success on his pleaded claims, and the result does not confer a meaningful public benefit." *Id.* at 1103.

McCown is inapposite to the present case. Here, Playfair obtained substantial success because she succeeded on her § 1983 claim, as evidenced by the Court's order requiring Defendants to set aside their decision regarding the non-renewal of Playfair's contract and to hold a fair hearing at which Playfair would have the opportunity to be heard. The fact that Playfair did not receive the exact relief she requested does not negate the fact that she prevailed overall on her § 1983 claim.

Additionally, the result Playfair received does confer meaningful public benefits. First, as a result of the Court's order, Defendants became aware of the proper process for deciding not to renew an employee's contract. In order to avoid future lawsuits, Defendants will likely ensure that they give other employees proper pre-termination notice and hearing before making such decisions. This will, in turn, benefit those employees because their due process rights will not be violated, and it will not be necessary for them to bring costly § 1983 claims against Defendants in order to protect their rights. Furthermore,

other school districts in Idaho are likely to learn about Playfair's case against Defendants and be deterred from terminating employees without giving them proper pre-termination notice and hearing. Thus, as a result of this action, the policies of Idaho school districts will likely be affected, and the due process rights of school district employees will likely be protected.

Finally, Defendants' argument that the attorney fee award should be reduced because Playfair did not obtain excellent results also lacks merit. *See Defendants' Response*, p. 12 (Docket No. 23). In support of their argument, Defendants cite *Hensley*, in which the Supreme Court stated: "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. ... [I]n some cases of exceptional success an enhanced award may be justified. ... If, on the other hand, a plaintiff has achieved only partial or limited success, the [lodestar amount] may be an excessive amount." 461 U.S. at 435–36. Thus, under *Hensley*, obtaining excellent results can be used by the court as a justification for *enhancing* an attorney fee award. However, *Hensley* does not stand for the proposition that if a plaintiff fails to achieve "excellent" results, but instead only achieves average results, the attorney fee award should be *reduced*.

*7 As discussed above, Playfair achieved more than "partial or limited success." Thus, the Court finds that, in this case, the lodestar amount represents a reasonable fee.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiff Playfair's Petition for Award of Attorney's Fees Pursuant to 42 U.S.C. § 1988, F.R.C.P. 54(d) and Local Rule 54.2 (Docket No. 22) shall be, and the same is hereby, **GRANTED**. Playfair is awarded attorney fees in the amount of $14,539.95.

D.Idaho,2010.
Playfair v. South Lemhi School Dist. 292 Bd. of Trustees
Not Reported in F.Supp.2d, 2010 WL 1138958 (D.Idaho)

END OF DOCUMENT

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **AFFIDAVIT OF KRISTINA SCHINDELE IN SUPPORT OF DEFENDANT'S FACTUAL SUPPLEMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO)
)ss.
County of Elmore)

I, KRISTINA SCHINDELE, having been duly sworn do hereby depose and say as follows:

1. I am the elected Prosecuting Attorney for Elmore County, and I have personal knowledge as to the organization of the supervision of employees in Elmore County.

2. In the Elmore County Personnel Policy, in discussing the pre-deprivation appeal hearing, indicates that any such hearing is to be held before the Supervising Elected Official. (See Affidavit of Barbara Steele in Support of Defendants' Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, Ex. A, p. 33).

3. At the time of her termination on April 30, 2012, Cherri Nix was a custodial and maintenance employee with Elmore County.

4. Had Ms. Nix had a pre-deprivation appeal hearing prior to her termination, this hearing would have been heard by the entire Board of Elmore County Commissioners, as her supervising elected official.

Dated this 19th day of March, 2013.

Kristina Schindele

SUBSCRIBED AND SWORN TO before me this 19th day of March, 2013.

NICOLE SEAMAN NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Elmore County
Commission Expires: 7-27-2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of March, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender	X	U.S. Mail
2700 Holly Lynn Dr.	___	Hand Delivered
Mountain Home, ID 83647	X	Email leeschlender@gmail.com
Plaintiff's Attorney	___	Fax

Jacob H. Naylor

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_08 Aff of Schindele in Supp of Memo in Opp to Pltfs Partial MSJ.wpd

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO,

Defendant.

Case No. CV-2012-1213

DEFENDANT'S FACTUAL SUPPLEMENT IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submit this factual supplement in Opposition to Plaintiff's Motion for Partial Summary Judgment.

In oral argument of March 18, 2013, before the Honorable Lynn G. Norton, the Court raised the question as to who would have been Plaintiff's Supervising Elected Official during her employment at Elmore County. In response to this question, the Elected Prosecuting Attorney for

Elmore County, Kristina Schindele, has firsthand knowledge establishing that the entire Board of Elmore County Commissioners would have been the Plaintiff's Supervising Elected Official in the event of any pre-deprivation hearing. The affidavit of Ms. Schindele indicating said knowledge is filed concurrently.

DATED this 19th day of March, 2013.

NAYLOR & HALES, P.C.

By _____
Jacob H. Naylor, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of March, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender	X U.S. Mail
2700 Holly Lynn Dr.	___ Hand Delivered
Mountain Home, ID 83647	X Email leeschlender@gmail.com
Plaintiff's Attorney	~~X Fax~~ JHN

_____
Jacob H. Naylor

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_09 Factual Supplement to Memo in Opp to Plfs Partial MSJ.wpd

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY, a political subdivision of the State of Idaho, Defendant.	Case No. CV-2012-1213 MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

E. Lee Schlender for the Plaintiff
Castleton for the Defendant

This matter came before the Court for oral argument on March 18, 2013, regarding Plaintiff's Motion for Partial Summary Judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiff Cherri Nix began employment with Defendant Elmore County on June 1, 2007.[1] On February 1, 2012, Plaintiff's supervisor, Vence Parsons, gave Plaintiff a "Notice of Disciplinary Action – Notice of Last Chance."[2] The Notice of Disciplinary action was given

[1] Affidavit of Steele, Ex. B. p. 5.
[2] *Id* at p. 1.

because of numerous alleged instances of poor performance.[3] On April 30, 2012, Plaintiff was terminated from her employment with Defendant by her Supervisor Vence Parsons.[4]

After the termination, Plaintiff and Defendant had numerous communications. Then, the Elmore County Board of Commissioners had a hearing where the board determined no hearing was required and issued a "Decision following Hearing June 11, 2012."[5] Plaintiff then filed this action on December 11, 2012 requesting damages. The Complaint alleges wrongful discharge violating the Elmore County Personnel Policy and the Idaho Protection of Public Employees Act.[6] The Plaintiff only moved for partial summary judgment on Count One alleging she was not afforded a pre-deprivation hearing required by the Elmore County Personnel Policy.

Plaintiff filed a Motion for Partial Summary Judgment on January 23, 2013. Defendant filed an opposition to Plaintiff's Motion for Partial Summary Judgment on March 4, 2013. Plaintiff replied on March 11, 2013. The Court has considered Ms. Nix's supporting brief and affidavit, Defendant's memorandum, the affidavit of Barbara Steele, and the Plaintiff's reply memorandum. The affidavit of Kristina Schindele was not filed until after the hearing by the Defendant. I.R.C.P. 56(c) provides that if the adverse party desires to serve opposing affidavits the party must do so at least fourteen days prior to the date of the hearing. Therefore, this affidavit was not considered by the court because it was untimely.

LEGAL STANDARD

Summary judgment is an appropriate remedy if the nonmoving party's "pleadings, affidavits, and discovery documents . . . , read in a light most favorable to the nonmoving party, demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002) (quoting I.R.C.P. 56(c)). The court must construe the evidence liberally and draw all reasonable inferences in favor of the nonmoving party. *Hei v. Holzer*, 139 Idaho 81, 84-85, 73 P.3d 94, 97-98 (2003). If the facts, with inferences favorable to the nonmoving party, are such that reasonable persons could reach differing conclusions, summary judgment is not available. *Hayward v. Jack's Pharmacy Inc.*, 141 Idaho 622, 625, 115 P.3d 713, 716 (2005).

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[3] *Id.* at pp. 2-5.
[4] Affidavit of Nix, Ex. D.
[5] *Id.* at Ex. I.
[6] *Id.* at Ex. E-I; Complaint filed December 11, 2012.

The moving party bears the initial burden of proving the absence of a genuine issue of material fact, and then the burden shifts to the nonmoving party to come forward with sufficient evidence to create a genuine issue of material fact. *Id.* When the nonmoving party bears the burden of proving an element at trial, the moving party may establish a lack of genuine issue of material fact by establishing the lack of evidence supporting the element. *See Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (1994) (concluding moving party's burden "may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial"). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Id.* at fn. 2. The nonmoving party "is not required to present evidence on every element of his or her case at that time, but rather must establish a genuine issue of material fact regarding the element or elements challenged by the moving party's motion." *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994). A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response . . . must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). Such evidence may consist of affidavits or depositions, but "the Court will consider only that material . . . which is based upon personal knowledge and which would be admissible at trial." *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 297-98, 847 P.2d 1156, 1158-59 (1992). If the evidence reveals no disputed issues of material fact, then only a question of law remains on which the court may then enter summary judgment as a matter of law. *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 445, 65 P.3d 184, 186 (2003).

Regarding contract disputes at summary judgment, "[w]hen the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists." *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640, 645 (1984). "Interpretation of unambiguous language in a contract is a question of law. Interpretation of an ambiguous contract is a question of fact. Whether a contract is ambiguous is a question of law." *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007). The Idaho Supreme Court has defined contractual ambiguity as "reasonably subject to conflicting interpretation." *Elliott v. Darwin Neibaur Farms*, 138 Idaho 774, 779, 69 P.3d 1035, 1040 (2003).

ANALYSIS

"It is settled law in Idaho that, unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party." *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 712, 874 P.2d 520, 523 (1994). An at-will employee can be terminated for any reason or no reason at all. *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003), *citing, Thomas v. Medical Center Physicians, P.A.*, 138 Idaho 200, 61 P.3d 557 (2002); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977). In fact, "[e]ither party may terminate the [employment] relationship at any time for any reason without incurring liability." *Id.* "This rule reflects the judiciary's reluctance to bind employers and employees to an unsatisfactory and potentially costly situation, although we recognize that either party is likely to be damaged by an unforewarned termination of the employment relationship." *Id.*

Plaintiff states in her affidavit that she was an employee of Elmore County for approximately five years[7] and that she "was not and is not, an at will employee" and that "she was a contract employee (full time) of Elmore County."[8]

While "[i]t is well settled in Idaho law that terms of an employee handbook or personnel manual can constitute an element of the employment contract" and Idaho case law clearly implies that employee handbook provisions can create enforceable contract rights in Idaho, the Plaintiff has not presented any admissible evidence at summary judgment to show there was a contract. *Ferguson v. City of Orofino*, 131 Idaho 190, 193, 953 P.2d 630, 633 (Ct. App. 1998) (citing *Harkness v. City of Burley*, 110 Idaho 353, 356, 715 P.2d 1283, 1286 (1986); *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640 (1984)).

The assertions the Plaintiff has offered do not show she had a contract to be employed for a specified time or which limits the reason(s) she may be terminated. While the Plaintiff attached portions of the Elmore County Personnel Policy (ECPP) to her affidavit (with the full policy attached to Ms. Steele's affidavit), the manual states in all capital letters at the top:

> THIS PERSONNEL POLICY IS NOT A CONTRACT. NO CONTRACT OF EMPLOYMENT WITH ELMORE COUNTY WILL BE VALID UNLESS IT IS SIGNED IN ACCORDANCE WITH PROPER PROCEDURES BY A

[7] Affidavit of Nix, ¶ 2.
[8] Complaint and Demand for a Jury Trial, ¶ 10.

SPECIFICALLY AUTHORIZED REPRESENTATIVE OF THE GOVERNING BOARD AND UNLESS IT IS SIGNED BY AND CONTAINS THE NAME OF THE EMPLOYEE WHO WOULD BE BENEFITTED BY THE CONTRACT.[9]

At summary judgment, the burden is on the Plaintiff to show a material issue of fact exists of whether there was a contract. The Plaintiff has not presented any evidence that the ECPP was signed by an authorized representative of the Elmore County Board of County Commissioners or signed by Ms. Nix. Elmore County argues that even by its own terms, the policy is not intended to be an enforceable contract, only guidelines and expectations. It is the court's obligation to discern the parties' intent by viewing the entire agreement as a whole. *Henderson v. Henderson Inv. Properties, L.L.C.*, 148 Idaho 638, 640, 227 P.3d 568, 570 (2010); *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 309, 160 P.3d 743, 748 (2007). The Court has reviewed the ECCP, not just the disclaimer on the front, and finds the Agreement as a whole was not intended to create enforceable contract rights.

Regarding contract disputes at summary judgment, "[w]hen the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists." *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640, 645 (1984). However, in this case, the Plaintiff has not presented conflicting evidence that the personnel policy was not a contract. There is no admissible evidence—only the Plaintiff's assertions—that a contract exists. Therefore, the evidence permits only one inference—there is no material issue of fact that the personnel policy constituted a contract between Elmore County and Ms. Nix. Absent a contract to the contrary, an employee is an at-will employee.

The existence of a grievance procedure in an employee policy manual is insufficient to overcome the presumption of employment at-will and create an issue of fact for trial. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242, 108 P.3d 380, 389 (2005). The Plaintiff has not met her burden at summary judgment by evidence sufficient to show that she was a contract employee as she alleges.

Since there was no contract, Plaintiff was an at-will employee and the Defendant had the ability to end the employment relationship at any time without incurring liability.[10]

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[9] Affidavit of Nix, Ex. C, p. 2; Affidavit of Steele, Ex. A, p. 7.

[10] *Id.*

The implied-at-law covenant of good faith and fair dealing in employment-at-will relationships covers "[a]ny action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant." *Metcalf v. Intermountain Gas Co.*, 116 Idaho 622, 627, 778 P.2d 744, 749 (1989). The covenant applies to both employment contracts and employment agreements that are not contractual. *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 640, 272 P.3d 1263, 1271 (2012). Even when there is no express employment contract and only an employment agreement, "the covenant is an objective determination of whether the parties have acted in good faith in terms of enforcing the contractual provisions." *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 243, 108 P.3d 380, 390 (2005). So, although this court has found the personnel policy did not constitute an employment contract, the court must further consider whether Elmore County acted in good faith in following its employment policies as stated in the personnel policy.

"The covenant only requires that both the employer and employee perform the obligations they agree to in good faith." *Idaho First Nat'l Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991). "A violation occurs when either party violates, qualifies, or significantly impairs any benefit or right of the other party under the agreement." *Bollinger*, 152 Idaho at 640, *See also Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 562, 212 P.3d 982, 992 (2009). The covenant "does not create a duty for the employer to terminate the at-will employee only for good cause." *Thompson v. City of Idaho Falls*, 126 Idaho 587, 593, 887 P.2d 1094, 1100 (Ct. App. 1994), *See also, Farnworth v. Femling*, 125 Idaho 283, 288, 869 P.2d 1378, 1383 (1994), *Olson v. Idaho State University*, 125 Idaho 177, 868 P.2d 505 (Ct. App. 1994). A breach of the covenant is not a tort, but instead a contractual breach with any potential recovery being contract damages. *Metcalf*, 116 Idaho at 626.

Plaintiff argues that the covenant of good faith and fair dealing was breached because she was entitled to and denied due process when she was terminated from Elmore County.[11] Plaintiff's assertion that she was a contract employee is addressed above. Plaintiff also asserts that she was a "regular, full time permanent employee" at the time of termination and, therefore, entitled to the disciplinary procedures and pre-deprivation rights as a regular full-time employee.[12] The admissible evidence before this court for purposes of summary judgment is that

[11] Complaint and Demand for a Jury Trial, ¶ 16.
[12] Affidavit of Nix, ¶ 4.

the Plaintiff was informed of her at-will status on February 1, 2012 in the document entitled "Notice of Disciplinary Action – Notice of Last Chance" when her supervisor, Vence Parsons, stated "You are, and remain, an at-will employee."[13] If there was an issue of Ms. Nix's classification before this letter, this letter clarified she was an at-will employee with a probationary status beginning February 1, 2012.[14] She was then terminated from her employment on April 30, 2012 while on probation.[15]

"Full-time regular" and "part-time regular" are defined on page 14 of Exhibit A. Under "Significance of Employee Classification," the handbook states "The procedures for hiring, promotion, and transfer of full-time employees shall be subject to the provisions of this policy. Personnel actions concerning part-time or casual employees are not subject to guidelines set forth herein unless the handbook provisions expressly provide therefore." There is no employee classification for probationary employees. Probation is only mentioned under "Probationary period" as

> The probationary period shall be regarded as an integral part of the selection process and shall be utilized for closely observing the employee's work, for securing the most effective adjustment of a new employee to his or her position and for rejecting an introductory employee whose performance is not satisfactory. The probationary period will typically be a standard 90 to 180 days.[16]

That last sentence was later amended to say, "The initial probationary period will be 1 year."[17] The term "regular" is never defined nor distinguished from "probationary" in the handbook. Also, the policy stated other changes in assignments and terms were not subject to appeal hearings and Elmore County retained "full authority, without prior notice, to modify the general terms and conditions of employment."[18]

Section 3 on page 20 of the disciplinary policy stated a supervisor could take "probation" as a disciplinary step for policy violations and in this case. Idaho law allows an employer to "unilaterally change the employment agreement by uniformly providing reasonable notice of the change to its affected employees; the employees accept by continuing to work following receipt of such notice." *Bollinger,* 152 Idaho at 638, *See Watson v. Idaho Falls Consolidated Hospitals,*

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[13] Affidavit of Nix, Ex. C, p. 6.
[14] *Id.* at Ex. D, p. 1; *See also* Affidavit of Steele, Ex. B, p. 5, 6.
[15] *Id.*
[16] Affidavit of Steele, Ex. A, p. 14.
[17] *Id.* at Ex. A, p.22.
[18] *Id.* at Ex. A, p. 34.

Inc., 111 Idaho 44, 48, 720 P.2d 632, 636 (1986); *Parker v. Boise Telco Fed. Credit Union*, 129 Idaho 248, 254, 923 P.2d 493, 499 (Ct. App. 1996). The Plaintiff was notified by Defendant on February 1, 2012 that her employment agreement was being changed. The letter stated,

> [Y]ou are hereby notified that...it is my intention to impose the following discipline:
>
> ...
>
> 2. You are placed on **Probationary Status** for a period of one (1) year. Your probation will run until **February 1, 2013.** You are, and remain, an at-will employee.
>
> ...
>
> 5. A failure to meet the goals set forth herein will subject you to termination at the conclusion of your year-long probationary period. A review of progress will be made with you throughout this year-long period. If progress is not evident, you may be subject to immediate termination at any time during the probationary period.

Aff. of Steele, Ex. B, p. 6 (Emphasis in original). Therefore, even if probation or probationary status had not been previously defined in the employee policy, any previous ambiguity in the policy of the meaning of "regular" was then overcome by this amendment to Ms. Nix where her status was defined unambiguously by her supervisor as on probationary status, as at-will employee, and subject to immediate termination at any time before February 1, 2013. In the court's review of the admissible evidence offered at this hearing, the supervisor, Vence Parsons, followed the policy requiring notice prior to discipline which could, and did, include placing her on probationary status as set out on page 33 of Exhibit A to the Steele Affidavit.[19] Therefore, Plaintiff was a probationary employee subject to immediate termination when she was terminated on April 30, 2012. At the time of her termination, the Plaintiff was not a "full-time regular" or "part-time employee" under the provisions of the employment policy so the Elmore County Board of County Commissioners was then not required to provide an appeal hearing prior to any final decision on discharge to comply with its policy on page 33 of Exhibit A to the Steele Affidavit.

The Plaintiff has not shown a material issue of fact exists that the Defendant breached the implied covenant of good faith and fair dealing.

[19] Affidavit of Nix, Ex. C, p. 6.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment on Count One, Defendant's breach of the implied covenant of good faith and fair dealing, is DENIED.

AND IT IS SO ORDERED.

Dated this 15th day of April, 2013.

Lynn G. Norton
District Judge

CLERK'S CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing document was sent to the following:

Kirtlan Naylor
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E. Lee Schlender
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Dated this 16th day of April, 2013.

BARBARA STEELE
Clerk of the District Court

By _____
Deputy Clerk

2

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, Vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO Defendant.	Case No. _2012-1213 MOTION FOR RULE 54 (b) CERTIFICATION

Plaintiff Cherri Nix by and through her undersigned attorney hereby moves this honorable court for certification as final, the court's Order Denying Motion for Partial Summary Judgment filed on April 16, 2013.

This Motion is based upon the finality of the Order on the following issues and there is no just reason for delay in that this cause and case law is by the Order established with respect to controlling issues :

1. That ambiguity if any of the employment status of Cherri Nix was cured and removed by a letter of her supervisor dated February 1, 2012.

2. The probationary status of Cherri Nix established she was not a "regular" or "full-time" employee.

3. Plaintiff was an employee-at-will not entitled to a pre-deprivation hearing.

4. Plaintiff was subject to immediate termination without a hearing .

5. Plaintiff was not a regular or full-time employee.

PLAINTIFF CERTIFIES THAT THERE ARE NO ISSUES OF FACT TO BE RAISED OR BROUGHT BEFORE THE COURT WITH RESPECT TO THESE ISSUE AND FINDINGS UPON FURTHER HEARING OR TRIAL.

Oral argument is requested upon this Motion.

Dated this 26 day of April, 2013.

E. Lee Schlender, Attorney for Cherri Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 26 day of April, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing Document, to wit:
Motion for rule 54 (b) Certification

To the Attorneys for Elmore County, by the following method:

First Class Mail addressed to: Yes. _____.

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E. Lee Schlender
Attorney for Plaintiff Nix

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, Vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO Defendant.	Case No. _2012-1213 MOTION FOR RULE 12 (B) PERMISSION TO APPEAL

Plaintiff Cherri Nix by and through her undersigned attorney hereby moves this honorable court for permission to appeal the Order Denying Motion for Partial Summary Judgment filed on April 16, 2013.

This Motion is based upon criteria stated in I.A.R. 12 (a) in that; there is a substantial difference of opinion on a controlling question of law and an immediate appeal will materially advance the orderly resolution of this litigation.

The Order of April 16, 2013 states therein on page eight (8) that the employment agreement of the plaintiff was changed by her supervisor's letter dated February 1,2012. The amendment is held by the court's Order to: (1) change her employment status; (2) remove any ambiguity as to the meaning of "regular" employee and (3) define or clarify the terms "probation" and "probationary status" as they are stated in the employee policy and their application to Nix.

There exists a controversy as to the law with respect to the following:

1.Can an employee of Elmore County, herein the supervisor, change the employment status of Cherri Nix by his letter and action?

2. Is there as a matter of law an ambiguity in the personnel policy as to how disciplinary probationary status defines Cherri Nix as not being a "regular" or "full-time" employee and if so, was that cured by the supervisor's letter to plaintiff?

3. Does the status of Cherri Nix as found by this court to be an employee-at-will control her right to a pre-deprivation hearing by reason of the court's finding her to be neither a full-time or regular employee as per the personnel manual?

4. Was the plaintiff subject to immediate termination without a hearing as a matter of law?

5. As a matter of law, was the plaintiff not a regular or full-time employee by reason of her probationary status?

Oral argument is requested upon this Motion.

Dated this 26 day of April, 2013.

E. Lee Schlender, Attorney for Cherri Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 26 day of April, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit:

to the Attorneys for Elmore County, by the following method:

First Class Mail addressed to: yes_____.

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E. Lee Schlender

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTIONS FOR I.A.R. RULE 12 PERMISSIVE APPEAL AND I.R.C.P. RULE 54(b) CERTIFICATION**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Memorandum in Opposition to Plaintiff's Motion for Permissive Appeal pursuant to Idaho Appellate Rule 12 and Motion for I.R.C.P. Rule 54(b) Certification. For the reasons set forth below these motions must be denied.

I.
INTRODUCTION

On April 16, 2013, this Court entered its Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment. In this Decision the Court found that there was no contract of employment between Plaintiff Nix and Defendant Elmore County, and thus Nix was an at-will employee. The Court further found that because the Plaintiff was notified on February 1, 2012, that her employment status was being changed to probationary, she was not entitled to an appeal hearing. Memorandum Decision and Order, p. 8. Thus, the Court denied the Plaintiff's Motion for Partial Summary Judgment in which Nix had sought the Court's ruling that she was entitled to the appeal hearing.

Plaintiff thereafter filed two motions with the Court. Plaintiff filed a Motion for Rule 12(b) Permission to Appeal, and Plaintiff also filed her Motion for Rule 54(b) Certification. In these motions Nix is asking this Court to allow an immediate appeal of the Court's Memorandum Decision and Order before any other issues in this case proceed. Nix has specified several questions related to the Memorandum Decision she seeks to appeal.

II.
ARGUMENT

A. Rule 54(b) Certification is Improper

In moving for a Rule 54(b) certificate, Nix must ordinarily demonstrate hardship, injustice, or some other compelling reason why the claims disposed of by the Court should now be allowed to be appealed short of the entire case being resolved at the district court level. *Milbank Mut. Ins. Co. v. Carrier Corp.*, 112 Idaho 27, 29 (1986); *Kolln v. Saint Luke's Regional Med. Ctr.*, 130 Idaho 323, 328 (1997). The Idaho Supreme Court has directed that a Rule 54(b) certificate

"should not be granted routinely, or as a matter of course; it should be reserved only for 'the infrequent harsh case.'" *Kolln*, 130 Idaho at 328. When there is an absence of any evidence in the record indicating any hardship, injustice, or compelling reason why a partial summary judgment granted to one party should be final before other claims, the Idaho Supreme Court has found an abuse of discretion in granting the 54(b) certificate. *Watson v. Weick*, 141 Idaho 500, 505-506 (2005); *see also Milbank Mut. Ins. Co.*, 112 Idaho at 29 (1986) (holding a grant of 54(b) certificate in absence of showing of hardship or injustice constitutes abuse of discretion). The delay of waiting for an appeal is not a hardship, where "the delay itself cannot constitute hardship for purposes of Rule 54(b), since the rule contemplates such delay absent a showing of 'no just reason for delay' in order to fairly adjudicate liability and avoid piecemeal appeals." *Milbank Mut. Ins. Co.*, 112 Idaho at 29; *see also Kolln,* 130 Idaho at 328.

However, the analysis above is wholly premature in the present case, as there has been no grant of summary judgment as to any claim. Rather, the Court's Memorandum Decision was a denial of partial summary judgment as to Nix. The County has not yet filed any affirmative motion for summary judgment as to the issues ruled upon by the Court, and accordingly Nix's claims with respect to her employment appeal (First and Second Causes of Action) are still technically pending and thus ineligible for Rule 54(b) certification even if the Court were to find all other factors in Nix's favor in the Rule 54(b) analysis.

Having stated that, those other factors are not established in Nix's favor. In her Motion Nix makes no argument and cites to no evidence showing any hardship, injustice, or some other compelling reason to appeal these issues. Instead, Nix merely asserts that "there is no just reason for delay...." Motion, p. 1. The County denies this, and asserts that aside from the procedural

ineligibility above, there is no reason why these claims should be appealed now as opposed to waiting until final resolution of the case as a whole for appeal. Nix has not cited any basis for doing so, and accordingly the Motion must be denied.

B. I.A.R. Rule 12 Permissive Appeal is Improper

Idaho Appellate Rule 12 sets forth that permission may be granted by the district court and then by the Idaho Supreme Court for an interlocutory appeal from an order of the district court "which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." The seminal Idaho case governing Rule 12 permissive appeals is *Buddell v. Todd*, 105 Idaho 2 (1983). *Buddell* sets forth several factors the Court should consider in determining whether to grant a permissive appeal here. These factors, when viewed in their totality against the backdrop of this case, fall squarely against Nix's motion for permissive appeal here.

The *Buddell* case set forth that "[i]t was the intent of I.A.R. Rule 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved." 105 Idaho at 4. Other factors for the Court to consider are: (1) the impact of an immediate appeal upon the parties; (2) the effect of delay of the proceedings in the district court pending the appeal; (3) the likelihood or possibility of a second appeal after judgment is finally entered by the district court; and (4) the case workload of the appellate courts. The *Buddell* court then explained that "[n]o single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by

Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeals which may be taken as a matter of right under I.A.R. 11." *Id.*

With the present motion, Ms. Nix has not set forth in her Motion any basis upon which this Court could engage in an analysis under *Buddell*. Rather, her sole supporting basis is her conclusory statement quoting the language of Rule 12 that "there is a substantial difference of opinion on a controlling question of law and an immediate appeal will materially advance the orderly resolution of this litigation." Motion, p. 1. But such is not the case here. To the contrary, the issues in the Court's decision sought to be appealed by Nix are based on a very straightforward and well-established series of Idaho Supreme Court cases involving at-will employment. This is hardly a case where there is an absence of guidance on the legal matters involved. The rules and principles relied upon by the Court are found in uniform and consecutive cases that are in harmony with each other. Thus, it cannot be said that there is a substantial difference of opinion on the controlling question of law in this case. Plaintiff's disagreement with the Court's decision does not create a substantial difference of opinion.

A permissive appeal now would not affect the orderly resolution of the remaining claims in this case. Because the claims raised in the Third Cause of Action are legally distinct from those raised in the First and Second, and where the Court's review of the claims in the Third Cause of Action is not contingent or dependent upon its ruling on the First and Second, a permissive appeal is not beneficial.

More so, to address the *Buddell* factors, this case does not involve issues of great public interest nor, as just stated, do the questions of law addressed by the Court's Memorandum Decision constitute issues of first impression. More so, the impact of a permissive appeal on the

parties and the effect of delay would be negative and detrimental, particularly where there is only one remaining claim where legal issues have not been resolved. The County would be forced to wait for 18 months or more for the appeal to progress through the system and be decided. Additionally, it is likely the party losing on Plaintiff's third claim would seek appeal at the conclusion of the case, resulting in a second appeal given that the legal issues in that claim are significantly different that the issues addressed in the Court's decision.

In sum, this is not an exceptional case meriting a permissive appeal as required by *Buddell*. Plaintiff Nix has not set forth any reason in her Motion why the circumstances in this case are exceptional and require an appeal now. As such, the Motion should be denied.

III.
CONCLUSION

For the reasons stated above, Plaintiff's Motion for Rule 54(b) Certification and Motion for I.A.R. Rule 12 Permissive Appeal must be denied.

DATED this 10th day of May, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of May, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender	X	U.S. Mail
2700 Holly Lynn Dr.	___	Hand Delivered
Mountain Home, ID 83647	X	Email leeschlender@gmail.com
Plaintiff's Attorney	___	Fax

Bruce J. Castleton

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BARBARA STEELE
CLERK OF THE COURT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI LYNN NIX, Plaintiff, vs. ELMORE COUNTY, a Political Subdivision of the State, Defendant.	Case No. CV-2012-1213 MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR INTERLOCUTORY APPEAL

I. Motion for Rule 54(b) Certification

The Plaintiff filed a Motion for Rule 54(b) Certification of this Court's Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment filed on April 16, 2013. This Court denied the Plaintiff's Motion for Summary Judgment on Count One, the Defendant's breach of the implied covenant of good faith and fair dealing. The Defendant filed an objection to the Plaintiff's motion on May 13, 2013. This matter came before the court for hearing on May 20, 2013.

A. Legal Standard

In moving for a certificate of final judgment where only partial claims are resolved under Idaho Rule of Civil Procedure 54(b), the moving party must demonstrate hardship, injustice, or some other compelling reason why the claims disposed of by the Court should now be allowed to be appealed short of the entire case being resolved at the district court level. *Milbank Mut. Ins.*

Co. v. Carrier Corp., 112 Idaho 27, 29 (1986); *Kolln v. St. Luke's Reg. Med. Ctr.*, 130 Idaho 323, 328 (1997). A Rule 54(b) certificate "should not be granted routinely, or as a matter of course; it should be reserved only for 'the infrequent harsh case.'" *Kolln*, 130 Idaho at 328.

B. Analysis on Motion for Rule 54(b) Certification

Since the court denied the Plaintiff's motion, this matter is set for trial. Therefore, this matter is not final. Pursuant to Idaho Rule of Civil Procedure 54(b)(1), the denial of a motion for partial summary judgment would only be final if this court directed the entry of a final judgment by reaching an express determination that there is no just reason for delay in entry of a final judgment. The Defendant is correct that the Plaintiff's request for certification as a final judgment is "wholly premature" since there has been no grant of summary judgment as to any claim. Since the motion for partial summary judgment was denied, all claims remain for trial, and since there are other claims that continue to be litigated, entry of a final judgment on Count One is premature. The Plaintiff has not demonstrated hardship, injustice, or some other compelling reason to grant the motion. The Court DENIES the Motion for a Rule 54(b) certificate on this claim.

II. Motion for Rule 12(B) Permission to Appeal

A Motion for Rule 12(B) Permission to Appeal was filed by Plaintiff's counsel on April 26, 2013 moving this court pursuant to Idaho Appellate Rule 12(b) for an order approving an interlocutory appeal from this court's Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment filed on April 16, 2013. The Defendant filed an objection to the Plaintiff's motion on May 13, 2013. This matter came before the court for hearing on May 20, 2013.

A. **Legal Standard**

Idaho Appellate Rule 12(a) provides:

> Permission to appeal may be granted by the Supreme Court to appeal from an interlocutory order ... of a district court in a ...civil action, ... which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.

The motion for permission to appeal from an interlocutory order is to be filed with the district court within fourteen days of the entry of the order, and noticed for hearing in the same manner as any other motion, although expedited. The court shall enter an order setting forth its reasoning for approving or disapproving the motion within fourteen days of the hearing. I.A.R. 12(b).

Under Idaho Appellate Rule 12, the court intended this rule to allow appeal in the exceptional case to resolve substantial legal issues of great public interest or legal questions of first impression with the court also considering the factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered, and the case workload of the appellate courts. *Budell v. Todd,* 105 Idaho 2, 665 P.2d 701 (1983); *Aardema v. U.S. Dairy Sys.,* 147 Idaho 785, 215 P.3d 505 (2009).

B. Analysis of Motion for Interlocutory Appeal

The Plaintiff moves for an interlocutory appeal of this Court's ruling denying a motion for partial summary judgment claiming there is a "controversy as to the law" with respect to issues addressed in the court's decision. The Plaintiff does not address what she contends is the controversy in the law. Additionally, the Plaintiff does not address how any of these issues are a controlling question of law. The Plaintiff cited a variety of decisions in her briefing on the

motion. Many are federal decisions or unpublished Idaho decisions which do not have precendential value controlling this court's decisions. The Court's decision cited well-settled and controlling Idaho Supreme Court opinions and there are not differences among these opinions on the law of at-will employment in Idaho. These are not issues that involve great public interest or issues of first impression. The Plaintiff has not established the denial of the motion for partial summary judgment involves a controlling question of law as to which there is substantial grounds for difference of opinion. Additionally, an interlocutory appeal would promote the orderly resolution of the claims with the motion for summary judgment or the remaining claims. Rather, an interlocutory appeal upon a denial of a motion for summary judgment where the court did not grant the summary judgment would substantially impede the orderly resolution of claims and interject the appellate courts unnecessarily into the trial process at this stage of litigation. This Court DENIES the Plaintiff's request for an order approving an interlocutory appeal from this court's Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment filed on April 16, 2013.

III. Conclusion on All Motions

For the foregoing reasons, this Court hereby DENIES the Plaintiff's request certifications as final judgment and also DENIES the Plaintiff's request for an order approving an interlocutory appeal from this court's Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment filed on April 16, 2013.

Dated this 20th day of May, 2013.

Lynn G. Norton
District Judge

CLERK'S CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing document was sent to the following:

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Dated this 21st day of May, 2013.

BARBARA STEELE
Clerk of the District Court

By _____
Deputy Clerk

26

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BARBARA STEELE
CLERK OF THE COURT
DEPUTY

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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Memorandum in Support of Motion for Summary Judgment pursuant to I.R.C.P. Rule 56. For the reasons set forth herein, the motion must be granted and the Plaintiff's claims dismissed with prejudice.

I. BACKGROUND

This Court is already well versed in the factual background of this case, having already issued its Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment on April 16 of this year. Thus, the Defendant will forego another recitation of the facts of this case. Instead, Defendant Elmore County hereby refers to and incorporates herein the record on summary judgment already before the Court through Plaintiff's prior Motion for Partial Summary Judgment.

However, it is important to note that following this Court's Memorandum Decision the Plaintiff filed two motions–a Motion for I.A.R. Rule 12(b) Permissive Appeal and a Motion for I.R.C.P. Rule 54(b) Certification–asking this Court to allow an appeal of the Memorandum Decision. At oral argument on these motions counsel for the Plaintiff stated multiple times that the facts upon which this Court relied in its Memorandum Decision are the facts of this case, and that there are no more facts for this Court to consider in addressing the issues of this case. Thus, Ms. Nix is bound by the statements of counsel regarding the state of the facts of this case. *See Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 109 (2009) (holding "it is generally accepted that the relationship between an attorney and client is one of agency in which the client is the principal and the attorney is the agent" and the client "is bound by counsel's actions"); *Eby v. State*, 148 Idaho 731, 736-737 (2010) (holding "[g]enerally, parties are bound by the actions (and failures to act) of their attorneys").

II. DEFENDANT ELMORE COUNTY IS ENTITLED TO SUMMARY JUDGMENT AND DISMISSAL OF PLAINTIFF'S CLAIMS

As this Court held in its Memorandum Decision, Ms. Nix was an at-will employee of Elmore County subject to immediate termination and not entitled to a pre-termination hearing. This Court

expressly found that the Plaintiff had failed to set forth any genuine issue of material fact as to the status of her employment and her claims of wrongful termination and breach of the covenant of good faith and fair dealing. Thus, Elmore County is entitled to a grant of summary judgment as to these claims (First and Second Causes of Action in Plaintiff's Complaint).

More so, Plaintiff's Third Cause of Action must likewise be dismissed on summary judgment. This Cause of Action, which asserts a claim under the Idaho Protection of Public Employees Act ("Whistleblower Statute"), must fail where Plaintiff failed to assert this claim within the express statute of limitations set forth in that Act. Idaho Code §6-2105(2) states that a civil cause of action under the Protection of Public Employees Act must be brought within one hundred eighty (180) days "after the occurrence of the alleged violation of this chapter." Plaintiff Nix was terminated on April 30, 2012. Affidavit of Cherri Nix Supporting Motion for Partial Summary Judgment, Exh. D. Her deadline to file a whistleblower action based on her termination was October 29, 2012. Nix did not file her Complaint and Demand for Jury Trial until December 11, 2012, well past the 180-day time period for filing. Thus, her whistleblower claim must be dismissed for failure to timely file her complaint within the applicable statute of limitations.

To the extent paragraph 16 of Plaintiff's Complaint sets forth any other cause of action regarding the County's alleged failure to give Nix a pre-termination hearing, Defendant Owyhee County seeks summary judgment on that claim as well based on the Court's earlier Memorandum Decision finding Nix to be an at-will employee. Owyhee County likewise moves for summary judgment as to the Third Cause of Action where the Plaintiff has failed to establish any recognized public policy that was violated by Owyhee County so as to exempt Nix's termination from the at-will laws of the State of Idaho.

III. CONCLUSION

For the reasons stated above, Defendant Owyhee County is entitled to summary judgment on the Plaintiff's claims and the Court must dismiss Plaintiff's Complaint with prejudice.

DATED this 25th day of June, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender	X U.S. Mail
2700 Holly Lynn Dr.	___ Federal Express
Mountain Home, ID 83647	___ Email: leeschlender@gmail.com
Plaintiff's Attorney	X Facsimile: 587-3535

_____
Bruce J. Castleton

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BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
Attorneys at Law
950 W. Bannock Street, Suite 610
Boise, ID 83702
Telephone No. (208) 383-9511
Facsimile No. (208) 383-9516
Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby files its Motion for Summary Judgment pursuant to I.R.C.P. Rule 56. For the reasons set forth in the accompanying Memorandum in Support, the motion must be granted and the Plaintiff's claims dismissed with prejudice.

DATED this 25th day of June, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of June, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender
2700 Holly Lynn Dr.
Mountain Home, ID 83647
Plaintiff's Attorney

X U.S. Mail
___ Federal Express
___ Email: leeschlender@gmail.com
X Facsimile: 587-3535

_____
Bruce J. Castleton

M:\CRMP\Nix v. Elmore County\Pleadings\8712_12 Motion for Summary Judgment.wpd

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E. LEE SCHLENDER
Schlender law offices
2700 Holly Lynn Drive
Mountain Home, Idaho 83647
Idaho Bar #1171/Washington Bar#33921
208-587-1999
leeschlender@gmail.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF

Defendant.

Case No. _2012-1213

PLAINTIFF'S AFFIDAVIT RE: MOTION FOR STAY: RULE 56 F MOTION

Cherri Nix, Plaintiff herein, being duly sworn on oath, does state:

1. I am the Plaintiff in the above-entitled action and have personal knowledge of the facts set for herein.

2. Attached hereto as Exhibit A are Plaintiff's First Interrogatories , Request for Production of Documents and First Request for Admissions.

3. Exhibit A was served on the Attorneys for Elmore County on June 17, 2013. A true copy of the fax transmission confirmation is attached hereto as Exhibit B.

4. It is necessary for this case as per the rulings of this Honorable Court that I establish issues of fact to be determined by a jury. By my outstanding discovery requests and requests for admissions as well as perhaps depositions to be taken herein I can prove certain facts that will allow me to prevail in this litigation. These facts include the following:

a. That Elmore County had in fact, a policy of not terminating or firing any employee for any reason, other than for cause. That the causes are set forth in the Personnel Manual of Elmore County. Further, that no employee had been terminated for any other reason than violation of the enumerated rules of

conduct therein, for a period of not less than ten years prior to date.

b. That Elmore County as a matter of history and fact, hired, retained and provided retirement benefits for specific time periods for more than ten years prior to date; that unless an employee for terminated for cause, no employee was terminated nor released until their retirement and /or they left the employee of Elmore County voluntarily.

c. That no reasons nor grounds for termination of Elmore County employees exists ; no policies for termination have been adopted nor published by Elmore County for a period of not less than ten years prior to date, except those expressly set forth in the Personnel Policy Manual as Rule of Conduct. Elmore County has in fact and practice , only used the Rules of Conduct as stated in the Manual as reasons for terminating any employee. The manual accordingly has by direct inference provided the sole and exclusive reasons by practice and custom, for terminating any employee of any reason, including cause.

d. There is no language in the Personnel Policy Manual that either expressly or by implication, provides any limitation or period of employment for any Elmore County employee.

e. There is no provision in fact or law in the practices of Elmore County for the past ten years prior to date, nor in the Personnel Policy Manual or any other law , statute or ordinance of the county, giving any supervisor or other employee of the county the power and authority to change modify, or interpret the Personnel Policy Manual , or resolve issues of ambiguity of that Manual in any respect whatsoever. That power and authority has been reserved to the Elmore County Commissioners.

f. That Elmore County has never in at least ten years prior to date terminated nor fired an employee without cause, except perhaps for across the board, required reductions in staff.

g. That there is no rule, guideline or authority in the Personnel Manual stating that another employee or supervisor of myself could change my status from that of a full time employee once I completed by initial probationary period. Accordingly , my supervisor's stating that I was not a full time or regular employee was a void act.

h. That Elmore County has not stated nor adopting any rule or regulation which states that I or any other employee of the county was or is, expressly an at-will employee, but conversely followed custom and action negating any such policy or rule , either of fact or law.

i. That at the time of my termination I was not a probationary employee except for disciplinary reasons; that I could not be fired nor terminated without cause; that I was entitled to a pre-deprivation hearing and not given one; that my supervisor had no authority to change my employment status so as to deprive me of such a hearing.

j. That the Elmore County Personnel Policy limits the reasons an employee may be discharged or terminated for cause.

k. That Elmore County has stated to the United States District Court for Idaho in Sommer v. Elmore County that: "The only limitation on the at-will employment relationship is that full-time and regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees." Accordingly, as a full time and regular employee, I was entitled to that hearing and was not given one.

Dated this 3 day of July, 2013.

Cherri Nix

Cherri Nix , Plaintiff herein

VERIFICATION

STATE OF IDAHO,)
) ss.
COUNTY OF ELMORE,)

Cherri Nix , being first duly sworn, deposes and states that she is the plaintiff named in the above-entitled action; that she has read the foregoing Affidavit and believes the facts therein stated to be true to the best of her knowledge.

Cherri Nix

Cherri Nix

SUBSCRIBED AND SWORN to before me this 3 day of July 2013.

E. LEE SCHLENDER NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho,
Residing at Mountain Home, Idaho

E. LEE SCHLENDER
Schlender law offices
2700 Holly Lynn Drive
Mountain Home, Idaho 83647
Idaho Bar #1171/Washington Bar#33921
208-587-1999
leeschlender@gmail.com

Exhibit A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.
ELMORE COUNTY,

Defendant .

Case No. __CV-2012-1213

Plaintiff's First Interrogatories,
Request for Production of Document and
First Request for Admissions

WILL YOU PLEASE TAKE NOTICE that Plaintiff herein requests Defendant above named to answer the following Interrogatories within thirty days from the date of service herein in conformance with all provisions of Rule 33 of the Idaho Rules of Civil Procedure.

In answering these Interrogatories, furnish all information available to you including information in the possession of you and your attorneys, investigators, experts, etc., retained by you and your attorneys (not merely information known of

your own personal knowledge) accountants, advisors or other persons directly or indirectly employed by or connected with you or your attorneys and anyone else otherwise subject to your control.

In answering these Interrogatories, you must make a diligent search of your records and of other papers and materials in your possession or available to you or your representatives. If an Interrogatory has subparts, answer each part separately and in full, and do not limit your answer to the Interrogatory as a whole. If these Interrogatories cannot be answered in full, answer to the extent possible, specify the reason for your inability to answer the remainder, and state whatever information and knowledge you have regarding the unanswered portion. With respect to each Interrogatory, in addition to supplying the information asked for and identifying the specific documents referred to, identify and describe all documents to which you refer in preparing your answers.

These Interrogatories are deemed continuing and your answers thereto must be supplemented, to the maximum extent authorized by law and the applicable rules, as additional information and knowledge becomes available or known to you.

DEFINITIONS

Unless otherwise indicated, the following definitions will be applicable to these Interrogatories:

A. "Person" means any natural person, corporation, partnership, proprietorship, association, governmental entity, agency, group, organization, or group of persons.

B. The word "Document" means every writing or record of every type and description that is or has been in your possession, custody, or control or of which you have knowledge, including but not limited to emails, correspondence, memoranda, tapes, stenographic or handwritten notes, studies, publications, books, pamphlets, pictures, drawings and photographs, films, microfilms, voice recordings, maps, reports, surveys, minutes or statistical compilations, or any other reported or graphic material in whatever form, including

copies, drafts, and reproductions. "Document" also refers to any other data compilations from which information can be obtained, and translated, if necessary, by you through computers or detection devices into reasonably usable form.

C. To "identify" a "document" means to provide the following information irrespective of whether the document is deemed privileged or subject to any claim of privilege:

1. The title or other means of identification of each such document;

2. The type of document (e.g., letter, memorandum, record);

3. The date of each such document;

4. The author of each such document;

5. The recipient or recipients of each such document, including but not limited to, Defendants or anyone who purports to represent the Defendant;

6. The present location of any and all copies of each such document in the care, custody, or control of Defendant;

7. The names and current addresses of any and all persons who have custody or control of each such document or copies thereof; and

8. If all copies of the document have been destroyed, the names and current addresses of the person or persons authorizing the destruction of the document and the date the document was destroyed.

In lieu of "identifying" any document, it shall be deemed a sufficient compliance with these interrogatories to attach a copy of each such document to the answers hereto and reference said document to the particular interrogatory to which the document is responsive.

D. To "identify" a natural person means to state that person's full name, title, or affiliation, and last-known address and telephone number. To "identify" a person that is a business, organization, or group of persons means to state the full name of such business, organization, or group of persons, the form of the business, organization, or group of persons

(e.g., government agency, corporation, partnership, joint venture, etc.), and to "identify" the natural person who would have knowledge of the information sought by the interrogatory.

E. "Defendant," "you" or "your" refers to, without limitation Inc. Elmore County, its agents, employees and commissioners .

F. Plaintiff refers to, without limitation, the named Plaintiff Cherri Nix.

G. Compiaint" refers to the Complaint filed by the Plaintiff in this action.

H. The Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A may be referenced herein as the ECPP or other term, such as Employment Policy or Policy.

ALSO PLEASE TAKE NOTICE that Plaintiff herein, pursuant to Rule 34 of the Idaho Rules of Civil Procedure, requests the production of documents as hereinafter described, at the office of the undersigned, E. Lee Schlender, counsel for Plaintiffs, within thirty days of service hereof. Compliance with this request may be made by mailing copies of the requested documents to the offices of E. Lee Schlender, 2700 Holly Lynn Drive, Mountain Home, Idaho 83647, within the requisite time period above described.

This request is intended to cover all documents in the possession of Defendant. or subject to Defendant's custody and control, whether located in Defendant's offices, or located in some other place.

IN THE EVENT ANY DOCUMENT OR WRITING IS NOT PRODUCED BY REASON OF A CLAIM OF PRIVILEGE OR CONFIDENTIAL INFORMATION, STATE THE EXACT BASIS OF THAT CLAIM. ALSO, NAMES AND ADDRESSES MAY BE REDACTED FOR PURPOSES OF CONFIDENTIALITY, AS LONG AS A DATE OR OTHER INFORMATION PROVIDES SUFFICIENT LANGUAGE TO DETERMINE THE NATURE OF THE DOCUMENT; FOR EXAMPLE, AS A TERMINATION, DISCHARGE, ETC.

ALSO PLEASE TAKE NOTICE that Plaintiff Requests Answers to the Request of Admissions contained herein, pursuant to the Idaho Rules of Civil Procedure.

PLAINTIFFS FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

INTERROGATORY NO. I.

State the name of any employee of Elmore County who within ten years from date of this interrogatory, was dismissed and/or terminated from employment for conduct or violation of any rule , other than those stated under Rules of Employee Conduct of the Elmore County Personnel Policy, pages 9 through 13 thereof which Policy is attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

INTERROGATORY NO. 2.

For each person named in Interrogatory No. 1 , state the conduct, which resulted in that employee being terminated and/or dismissed.

INTERROGATORY NO. 3.

State which person or persons, if any as named in answer to Interrogatories 1 and 2 a full-time employee of Elmore County at the time of the termination and/or dismissal.

REQUEST FOR PRODUCTION OF DOCUMENTS NO 1.

Provide a copy of the final Order and/or Decision terminating and/or dismissing any person named in answer to Interrogatories 1 and 3.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2.

Provide a copy of the final Order and/or decision terminating any employee of Elmore County for any reason whatsoever, for the last ten years. For purposes of privacy, unless the name is one provided in answer to Interrogatories 1 and 3, the name of the terminated individual may be redacted from the document or documents of dismissal and/or termination.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 3.

Provide a copy of every Rule of Conduct adopted and/or promulgated by Elmore County for its employees for the last ten years, other than those stated Rules of Employee Conduct of the Elmore County Personnel Policy, pages 9 through 13 thereof which Policy is attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.
If none exists, please so state.

INTERROGATORY NO. 4.

State what Rule or Rules of Conduct where relied upon by Elmore County for the termination and/or dismissal of any employee for the past ten years, other than those Rules of Employee Conduct of the Elmore County Personnel Policy, pages 9 through 13 thereof, which Policy is attached to the affidavit of Barbara Steele, dated March 4, 2013 as Exhibit A.

INTERROGATORY NO. 5.

State the name of each full-time employee of Elmore County terminated and/or dismissed by the County in the past ten years who was not given an Appeal Hearing as provided by the Elmore County Personnel Policy, pages 9 through 13 thereof, which Policy is attached to the affidavit of Barbara Steele, dated March 4, 2013 as Exhibit A. pages 33 and 34 thereof.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 4.

Provide a copy of each Order and/or Decision terminating any employee in the manner as described in Interrogatory No. 6 ; any full-time employee not given an Appeal Hearing. ? If none exists, please so state.

INTERROGATORY NO. 6.

State the limitation on time or length of employment if any of any full-time Elmore County employee, as the same is stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 5.

Provide a copy of every document stating any Policy adopted by Elmore County in the past ten years which states a date and/or time limitation on the employment of full-time employees of the County, other than what may be stated expressly or implied, in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A . If it does not exist, please so state.

INTERROGATORY NO. 7.

State the title and office of each and every elected and/or non-elected person who for the past ten years has held the authority to terminate and/or dismiss any full-time employee of Elmore County.

INTERROGATORY NO. 8.

State the title and office of each and every elected and/or non-elected person who for the past ten years has held the authority to terminate and/or dismiss any employee of Elmore County during the first year of their employment while they were on probationary status.

INTERROGATORY NO. 9.

State the names of those employees of Elmore County who while on first hire probationary status have been granted a pre-deprivation hearing prior to final dismissal as an employee, for the past ten years.

INTERROGATORY NO. 10.

State if the term "employee at will" or any similar phrase is stated or used in any Personnel Policy of Elmore County, including the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR PRODUCTION NO. 6.

Provide a copy of each and every writing or document described or named in answer to Interrogatory No. 10.

INTERROGATORY NO. 11.

Identify any writing of any kind, which constitutes a decision, or policy of the Elmore County Commissioners in the past ten years, which states a date and/or time limitation on the employment of full-time employees of the County. ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO. 7.

Provide a copy of any document or writing identified in answer to Interrogatory No. 11.

INTERROGATORY NO. 12.

State what document considered as a policy or practice applicable to Elmore County employees adopted by the Elmore County Commissioners by vote and/or signature in the past ten years which states that any employee may be terminated and/or dismissed without cause. In answering this Interrogatory, if reference is made to a document believed to imply dismissal without cause, so identify the document and language therein. ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO. 8.

Provide a copy of each document or writing identified or otherwise described in answer to Interrogatory No. 12.

INTERROGATORY NO. 13.

State the name of any elected or non-elected person or political entity and/or body that Elmore County allows directly or indirectly, to change any term or condition of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

INTERROGATORY NO. 14.

State if any non-elected official of any department of the Elmore County government or staff, may terminate any employee in a specific department.

INTERROGATORY NO. 15.

Does there exist any written policy, letter or document issued and/or adopted by the Elmore County Commissioners in the past ten years that states any employee of Elmore County can be terminated and/or dismissed for any reason other than those set forth in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO 9.

Provide a copy of any document identified in your answer to Interrogatory No. 15.

INTERROGATORY NO. 16.

Does there exist any written policy, letter or document issued and/or adopted by the Elmore County Commissioners in the past ten years that states any employee of Elmore County can be terminated and/or dismissed without cause ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO. 10.

Provide a copy of each item identified in answer to Interrogatory No. 16.

INTERROGATORY NO. 17.

Did the supervisor of the Plaintiff have the authority as per any law or policy of Elmore County to change her status from any type of employment other than full-time ?

REQUEST FOR PRODUCTION NO. 11.

Provide a copy of any document stating the authority of Plaintiff's supervisor to change her status from that of a full-time employee, if any exists. If it does not, please so state.

INTERROGATORY NO. 18.

State the section and paragraph of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A , by which the Plaintiff was placed on probationary status by her supervisor.

INTERROGATORY NO. 19.

State what document, writing or policy of Elmore County provided authority for the supervisor of Plaintiff to determine and/or establish, that her status after her initial first hire employment period expired, was that of an at-will employee.

REQUEST FOR PRODUCTION NO. 12.

Provide a copy of any item described or named in Interrogatory No. 19.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 13.

Provide a copy of each and every document which sets forth the acts or actions of plaintiff other than as stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, for which she could be dismissed and/or terminated.

INTERROGATORY NO. 19.

State what section and/or provision of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, provides that probationary employees are "at-will employees."

INTERROGATORY NO. 20.

Was Plaintiff terminated and/or dismissed from employment by Elmore County without further pay ?

INTERROGATORY NO. 21.

Name the page, section and paragraph of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, which was relied upon by her supervisor as authority to change her status from other than that of a full-time employee prior to her termination.

PLAINTIFFS FIRST REQUEST FOR ADMISSIONS

FIRST REQUEST FOR ADMISSION NO. 1

Admit that Plaintiff did not sign any document approved and authorized by the Elmore County Commissioners, stating that she understood and/or agreed that the Elmore County Policy Manual was not a guarantee of any particular length or term of employment.

REQUEST FOR ADMISSION NO. 2.

Admit that only an appointed , elected official of Elmore County or a politic body of such elected officials, has the authority to change or alter any provision of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 3.

Admit that only the Elmore County Commissioners have the authority to provide an interpretation of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A. in the event any provision thereof is deemed to be ambiguous.

REQUEST FOR ADMISSION NO. 4.

Admit that the Elmore County Commissioners did not by any specific ruling , decision or order state prior to June 2012 that Plaintiff was at the time of her termination on probation in accordance with that section of the ECPP entitled "Employee Classification, compensation and Benefits", sub-section B. Probationary Period ; all as found on page 14 of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 5.

Admit that Elmore County's Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A , can be changed only after notifying elected officials and at the discretion of the Board of County Commissioners.

REQUEST FOR ADMISSION NO. 6.

Admit that no neither Mr. Vence Parsons or any other supervisor of Plaintiff notified in writing, any elected official of Elmore County of any Elmore County personnel policy change regarding Plaintiff, prior to her termination of employment. If you deny this request, provide a copy of any such notification.

REQUEST FOR ADMISSION NO. 7.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A places limitations on the reasons an employee may be discharged and terminated.

REQUEST FOR ADMISSION NO. 8.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A contains all of the causes related to performance of job duties or other violations of the policy as grounds for termination , adopted or ordered by the Elmore County Commissioners prior to the Plaintiff's termination.

REQUEST FOR ADMISSION NO. 9.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state that it is not part of any type of employment contract.

REQUEST FOR ADMISSION NO. 10.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state in any provision thereof, that employees are at-will .

REQUEST FOR ADMISSION NO. 11.

Admit that Plaintiff did not sign any agreement between her and the Elmore County Commissioners specifically stating that her employment could be terminated without cause at any time.

REQUEST FOR ADMISSION NO. 12.

Admit that no supervisor of Plaintiff had vested authority to change the status of Plaintiff from that of a full-time employee. If denied, provide a copy of the decision, policy or order of the Elmore County Commissioners granting that authority to any supervisor.

REQUEST FOR ADMISSION NO. 13.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A is the only policy document of Elmore County stating the reasons for which Plaintiff could be terminated and/or discharged.

REQUEST FOR ADMISSION NO. 14.

Admit that in no employee of Elmore County has in the past twenty years been terminated and/or discharged for any reason other than those stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 15.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state in any provision thereof, that

employees may be terminated without cause.

REQUEST FOR ADMISSION NO. 16.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state that employees may be terminated at any time for reasons not stated in that document.

REQUEST FOR ADMISSION NO. 17.

Admit that plaintiff had a property interest in her employment regardless of any contractual right created by the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 18.

Admit that it is the contention of Elmore County in this case that unless Plaintiff was hired pursuant to a contract, her employment was at-will.

REQUEST FOR ADMSSION NO. 19.

Admit that prior to the month of June 2012, no elected official of Elmore County advised Plaintiff orally or in writing that she was an employee at-will.

REQUEST FOR ADMISSION NO. 20.

Admit that plaintiff was a full time employee of Elmore County at the time of her termination.

REQUEST FOR ADMISSION NO. 21.

Admit that plaintiff's probationary period ordered by her supervisor Vence Parsons on February 1, 2012 was for a disciplinary reason.

REQUEST FOR ADMISSION NO. 22.

Admit that plaintiff successfully completed her first hire probationary period one year after the calendar year 2007 in which she was hired.

REQUEST FOR ADMISSION NO. 23.

Admit that Vence Parsons was without authority to change, modify or establish any employment policy of Elmore County .

REQUEST FOR ADMISSION NO. 24.

Admit that only the Elmore County Commissioners have the authority to change the terms and conditions of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, which must be by an express writing.

REQUEST FOR ADMISSION NO. 25.

Admit that only the Elmore County Commissioners have the authority to interpret the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A with respect to the reasons for employee termination.

REQUEST FOR ADMISSION NO. 26.

Admit that Vence Parsons had no vested authority to change the status of Plaintiff from a full time employee as defined in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 27.

Admit that Vence Parsons at no time between 2010 and this date, was an elected official of Elmore County.

REQUEST FOR ADMISSION NO. 28.

Admit that Vence Parsons in 2012 was at all times relevant to this action, an employee of Elmore County and subject to the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 29.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A contains no statement other than in the paragraph discussing the introductory period of employment, that employees can be discharged for any reason or at any time, without cause.

REQUEST FOR ADMISSION NO. 30

Admit that no employee of Elmore County including supervisors, have the authority to resolve for any employment issue, any express or implied ambiguity in
The Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR ADMISSION NO. 31.

Admit that Plaintiff was not advised of her at will status as an employee, other than by those notifications authored by Vence Parsons, her supervisor.

REQUEST FOR ADMISSION NO. 32.

Admit that Elmore County has represented to the United States District Court for the District of Idaho in Sommer v. Elmore County, et al Case 1:11-cv-00291-REB that:

" The only limitation on the at-will employment relationship is that full-time regular and part-time regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees."

REQUEST FOR ADMISSION NO. 33.

Admit that after serving her initial first-hire probationary period, Plaintiff was a full-time employee in accordance with the employee classification system provided by the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR ADMISSION NO. 34.

Admit that the Elmore County Commissioners did not by an official act, change the employment status of Plaintiff from being a full-time employee, until date of her termination.

REQUEST FOR ADMISSION NO. 35

Admit that no act by an elected official of Elmore County changed the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A. regarding the classification of employees as full-time or otherwise, between
January 1, 2013 and the date of plaintiffs termination of employment.

REQUEST FOR ADMISSION NO. 36

Admit that employees place on disciplinary probation as per the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A are not automatically re-classified as not being full-time employees.

REQUEST FOR ADMISSION NO. 37

Admit that full-time employees placed on disciplinary probationary status are not first-hire employees subject to the probationary period stated on Pages 14 and 15 of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

Dated this 17th day of June, 2013.

E. Lee Schlender, Attorney for Plaintiff Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 18 day of June, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit:

PLAINTIFFS FIRST INTERROGATORIES, REQUEST FOR PRODUCTION OF DOCUMENTS AND FIRST REQUESTS FOR ADMISSIONS

to the Attorneys for Elmore County, by the following method:

First Class Mail addressed to: yes._____.

Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702

FAX : __X_____. yes____XX___.383-9516

E. Lee Schlender
Attorney for Plaintiff Nix

WorkCentre 7132

Transmission Report

G3 ID 2085870992 Date/Time:06/17/2013;12:09PM
Page:1 (Last Page)

Local Name E. Lee Schlender
Logo

Document has been sent.
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.
ELMORE COUNTY,

Defendant.

Case No. __CV-2012-1218

Plaintiff's First Interrogatories, Request for Production of Document and First Request for Admissions

WILL YOU PLEASE TAKE NOTICE that Plaintiff herein requests Defendant above named to answer the following interrogatories within thirty days from the date of service herein in conformance with all provisions of Rule 33 of the Idaho Rules of Civil Procedure.

In answering these interrogatories, furnish all information available to you including information in the possession of you and your attorneys, investigators, experts, etc., retained by you and your attorneys (not merely information known of

Exhibit B

Total Pages Scanned: 15 Total Pages Sent : 15

No.	Doc.	Remote Station	Start Time	Duration	Pages	Mode	Contents	Status
1	0514	Fax	6-17;12:04PM	4m30s	15/ 15	G3		CP

Note:
RE: Resend MB: Send to Mailbox BC: Broadcast MP: Multi Polling RV: Remote Service
PG: Polling RB: Relay Broadcast RS: Relay Send BF: Box Fax Forward CP: Completed
SA: Send Again EN: Engaged AS: Auto Send TM: Terminated

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO
Defendant.

Case No. _2012-1213

MOTION FOR STAY : DEFENDANTS MOTION FOR SUMMARY JUDGMENT I.R.C.P. 56 (f). WITH SUPPORTING AFFIDAVIT OF CHERRI NIX

Comes now the Plaintiff Cherri Nix in the above entitled proceeding and requests of this Honorable Court that this Motion for Stay of Defendants Motion for Summary Judgment filed as per I.R.C. P. 56 (f), be in all respects granted for the reasons as set forth in the Affidavit of Cherri Nix filed herewith in support of this Motion.

This Motion is not filed nor pursued to delay or hinder this litigation but to allow a reasonable time for discovery herein; Plaintiff has outstanding since June 17, 2013 Requests for Production of Documents, Requests for Admissions and Interrogatories, the same being attached to the Affidavit of Nix as Exhibit A.

Oral Argument is Requested.

Dated this 3 day of July, 2013.

E. Lee Schlender, Attorney for Plaintiff Cherri Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 3 day of July, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit:
PLAINTIFF'S MOTION FOR STAY ; HEARING UPON MOTION FOR SUMMARY JUDMENT AND AFFIDAVIT OF CHERRI NIX

to the Attorneys for Elmore County:
Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702
BY THE FOLLOWING METHOD:
FAX : 383-9516

E. Lee Schlender

3

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2013 JUL 22 PM 2:13

BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
Attorneys at Law
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Facsimile No. (208) 383-9516
Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Memorandum in Support of Motion for Protective Order pursuant to I.R.C.P. Rule 26.

Currently pending before this Court is Defendant's Motion for Summary Judgment, filed on June 25, 2013. This summary judgment motion notes simply that this Court has previously ruled that Plaintiff failed to set forth any genuine issue of material fact as to any contractual nature of her

employment, and denied her partial summary judgment motion regarding claims of wrongful termination and breach of the covenant of good faith and fair dealing as a matter of law as Plaintiff was an at-will employee. (Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment, April 15, 2013, pp. 5, 8.) Therefore, Plaintiff's at-will employment status is a legal determination previously made by this Court, and is controlling in Defendant's pending motion for summary judgment. Defendant has alleged no additional facts in its summary judgment motion beyond those established by Plaintiff in her initial partial summary judgment motion. Summary judgment is appropriate for Defendant because of Plaintiff's at-will employment status. Likewise, as to Plaintiff's Third Cause of Action alleging violation of the Protection of Public Employees Act (which was not addressed in Plaintiff's initial partial summary judgment motion), Defendant has asserted a simple statute of limitations defense which requires no further factual development.

Good cause exists for staying discovery pending this Court's determination of Defendant's Motion for Summary Judgment. I.R.C.P. 26; *Avila v. Wahlquist*, 126 Idaho 745, 749 (1995). It is a matter of the court's discretion to suspend discovery pending a potentially dispositive summary judgment motion. *Id.* Defendant's pending Motion for Summary Judgment is based on this Court's prior legal holdings regarding Plaintiff's at-will status, and to allow any discovery prior to the determination of that summary judgment motion would only impose unnecessary cost and effort to Defendant. Staying discovery at this point in the litigation would avoid this unnecessary cost and effort to Defendant while preserving judicial economy in resolving a potentially dispositive motion before the Court.

Additionally, Plaintiff has a currently pending a 56(f) motion to stay determination Defendant's pending summary judgment motion to allow Plaintiff to conduct discovery prior to determining the Defendant's summary judgment motion. This motion also supports Defendant's request for a protective order staying discovery. Plaintiff has asserted what facts she intends to establish through her discovery that would require a stay of Defendant's Motion for Summary Judgment. Should the Court deny Plaintiff's 56(f) motion, and thus deem that Plaintiff's discovery is immaterial to Defendant's dispositive summary judgment motion, the logical conclusion is that any discovery completed before the summary judgment determination would be unnecessary. Therefore, a protective order is currently appropriate, at least until the Court determines Plaintiff's 56(f) motion to stay Defendant's summary judgment motion, to avoid the unnecessary expense of completing discovery that would later be held as immaterial to Defendant's dispositive summary judgment motion.

CONCLUSION

For the reasons stated above, Defendant Owyhee County requests a protective order staying all discovery until the determination of its pending Motion for Summary Judgment.

DATED this 22nd day of July, 2013.

NAYLOR & HALES, P.C.

By _____ FOR:
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of July, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy Copy: Hon. Lynn G. Norton District Court Judge Fourth Judicial District	☒	Email: lnorton@adaweb.net; hfurst@elmorecounty.org
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	X ___ ___ X	U.S. Mail Federal Express Email: leeschlender@gmail.com Facsimile: 587-3535

FOR:
Bruce J. Castleton

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2013 JUL 22 PM 2:13

BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MOTION FOR PROTECTIVE ORDER**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., pursuant to Idaho Rule of Civil Procedure 26(c), hereby requests the Court issue a protective order staying all further discovery pending resolution of Defendant's Motion for Summary Judgment. This motion is supported by the pleadings and documents on file and Defendant's Memorandum in Support of Motion for Protective Order, filed concurrently.

DATED this 22nd day of July, 2013.

NAYLOR & HALES, P.C.

By _____ For:
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of July, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy Copy: Hon. Lynn G. Norton District Court Judge Fourth Judicial District	☒	Email: lnorton@adaweb.net; hfurst@elmorecounty.org
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	X ___ ___ X	U.S. Mail Federal Express Email: leeschlender@gmail.com Facsimile: 587-3535

_____ For:
Bruce J. Castleton

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37

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2013 JUL 29 AM 11:48

BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR STAY OF DEFENDANT'S SUMMARY JUDGMENT**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Memorandum in Opposition to Plaintiff's Motion for Stay of Defendant's Summary Judgment pursuant to I.R.C.P. Rule 56(f).

Currently pending before this Court is Defendant's Motion for Summary Judgment, filed on June 25, 2013. In response, Plaintiff filed her Motion for Stay on July 3, 2013, with her accompanying affidavit, alleging that outstanding discovery responses are necessary to "prove certain

facts that will allow [her] to prevail in this litigation." (Plaintiff's Affidavit Re: Motion for Stay: Rule 56 F Motion, ¶ 4, hereinafter "Plaintiff's Motion to Stay Aff.") However, the facts that she wishes to establish are immaterial to her defense of Defendant's Motion for Summary Judgment, and would not affect the Court's ability to determine summary judgment for Defendant, even if established. Accordingly, Defendant has filed a Motion for Protective Order to stay responses to Plaintiff's discovery pending resolution of the summary judgment motion.

Defendant's summary judgment motion argues simply that this Court has previously ruled that Plaintiff failed to set forth any genuine issue of material fact as to any contractual nature of her employment, and denied her partial summary judgment motion regarding claims of wrongful termination and breach of the covenant of good faith and fair dealing as a matter of law as Plaintiff was an at-will employee. (Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment, April 15, 2013, pp. 5, 8; hereinafter "April 15, 2013 Memorandum and Order.") Therefore, Plaintiff's at-will employment status is a legal determination previously made by this Court, and is controlling in Defendant's pending Motion for Summary Judgment. Defendant has alleged no additional facts in its summary judgment motion beyond those established by Plaintiff in her initial partial summary judgment motion. Plaintiff, through her affidavit, seeks no further discovery regarding the contractual basis for her employment.

"The decision to extend time to supplement an affidavit is within the sound discretion of the trial court." *Rhodehouse v. Stutts*, 125 Idaho 208, 211 (1994). In order to meet her burden in a motion to stay summary judgment pending further discovery, plaintiff "has the burden of setting out 'what further discovery would reveal that is essential to justify their opposition,' making clear 'what

information is sought and how it would preclude summary judgment.'" *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239 (2005), quoting *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001).

Primarily, and as argued in Defendant's Motion for Summary Judgment, it is important to note that following this Court's Memorandum Decision the Plaintiff filed two motions–a Motion for I.A.R. Rule 12(b) Permissive Appeal and a Motion for I.R.C.P. Rule 54(b) Certification–asking this Court to allow an appeal of the Memorandum Decision. At oral argument on these motions counsel for the Plaintiff stated multiple times that the facts upon which this Court relied in its Memorandum Decision are the facts of this case, and that there are no more facts for this Court to consider in addressing the issues of this case. Thus, Plaintiff is bound by the statements of counsel regarding the state of the facts of this case. *See Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 109 (2009) (holding "it is generally accepted that the relationship between an attorney and client is one of agency in which the client is the principal and the attorney is the agent" and the client "is bound by counsel's actions"); *Eby v. State*, 148 Idaho 731, 736-737 (2010) (holding "[g]enerally, parties are bound by the actions (and failures to act) of their attorneys"). Plaintiff should not now, when facing summary judgment, be able to assert the need for further factual discovery as Defendant has relied on the prior statements of her counsel that the facts were established.

However, even addressing Plaintiff's currently pending motion to stay on its merits, while never clearly stated in briefing or in affidavit, the further discovery that Plaintiff seeks as "essential to justify her opposition" can be broken down into two general categories: (1) history and facts that would support the assertion Elmore County had an implied policy for only terminating employees

for cause (Plaintiff's Motion to Stay Aff., ¶¶ 4(a), (b), (c), (d), (f), (h), (i), (j) and (k)); and (2) facts and history to support the assertion that the Elmore County Personnel Policy cannot be changed, modified, or interpreted by anyone other than the Elmore County Commissioners. (*Id.* at ¶¶ 4(e), (g), and (i)). Plaintiff seems to oppose Defendant's Motion for Summary Judgment through argument that she was not an at-will employee based solely on the history and previous practices of Defendant, which is legally unfounded by basic Idaho precedent. She also seems to argue that the Personnel Policy was somehow improperly modified or interpreted, which is immaterial to her termination as an at-will employee as this Court has established that it is not a contractual basis for her employment.

1. **Any Prior Facts Supporting Historical Precedent Supporting Alleged For Cause Terminations are Immaterial to Defendant's Motion for Summary Judgment.**

First and foremost, the Idaho Supreme Court has clearly stated that, "**An employer's custom of only terminating employees for good cause is likewise not sufficient to support a claim of an implied contract term eliminating the employer's right to terminate at will.**" *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242, 108 P.3d 380, 389 (2005) (emphasis added). Thus, any further discovery that Plaintiff seeks to support her assertion that she was not an at-will employee based on any "history or fact" regarding terminations of employees of Defendant in the past 10 years is patently unsupported by Idaho law. Even were Plaintiff able to find evidence through discovery that would support her assertion, she would still be unable to withstand summary judgment as a matter of law pursuant to firmly established Idaho law.

In *Jenkins, supra*, the plaintiff there attempted to argue exactly what Plaintiff is arguing here: that "salaried personnel in positions similar to [the Plaintiff] were not normally discharged without

cause," and thus he was a "for cause" employee. The court there held that simply having a policy or procedure for terminating employees without cause "did not represent the idea that an employee could only be terminated for cause." *Jenkins*, 141 Idaho at 242. In fact, the Court cited to a specific policy basis for why such an interpretation of the Idaho at-will presumption of employment was essential. To find to the contrary would imply that an employer would be in a position where it would be in its self-interest to abandon its pro-employee policies, such as indiscriminately firing employees for no cause in order to maintain its employees' at-will status. This is why the *Jenkins* court made clear that "an employer may provide guidelines, which are necessary conditions for continued employment, and *avoid having them read as a guarantee for a specified term of employment or placing limits on the reasons for discharge*." *Jenkins*, 141 Idaho at 242 (emphasis added). As discussed previously before this Court, the Personnel Policy is simply a general policy statement favoring employees.

As this Court has previously held, Plaintiff was an at-will employee of Defendant because she had not presented any admissible evidence to show "she had a contract to be employed for a specified time or which limits the reason(s) she may be terminated." (April 15, 2013 Memorandum and Order, p. 4) (emphasis added). Plaintiff's purported further discovery would not fix that prior deficiency. In Idaho, employment is at-will unless an employee is hired pursuant to a contract that specifies the duration of employment or limits the reasons for which an employee may be terminated. *See Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 387 (Idaho 2005). Plaintiff now, however, seeks to establish "for cause" status not from the existence of a contract, but rather from the lack of a statement or rule from Defendant explicitly stating that she was "at-will." (See Plaintiff's Motion

to Stay Aff., ¶ 4(h)). She intends to apparently show that she was an implied "for cause" employee simply by virtue of an alleged historical precedent for only terminating employees "for cause," which argument has actually been directly rejected by the Idaho Supreme Court.

Defendant's Personnel Policy sets forth pro-employee conditions of employment that generally encourage positive employee relations. The disclaimers and statements in the Personnel Policy indicate that it is intended to be a general statement of policy, not a contract. Idaho precedent, along with this Court's own prior holding, is clear: a policy must indicate an intent that it become part of the employment agreement. Where, as here, there is contract disclaimer language specifically negating such intent, the at-will presumption stands. In addition, part of Plaintiff's sought after discovery would be to establish that, "[t]here is no language in the Personnel Policy Manual that either expressly or by implication, provides any limitation or period of employment for any Elmore County employee." (Plaintiff's Motion to Stay Aff., ¶ 4(d)). This would directly support Defendant's Motion for Summary Judgment in that Plaintiff would be considered an at-will employee because there is no limitation or period of employment for any Elmore County employee.

2. **Any Alleged Change or Interpretation of the Personnel Policy Manual is Immaterial to Defendant's Motion for Summary Judgment.**

Again, Plaintiff "has the burden of setting out 'what further discovery would reveal that is essential to justify their opposition,' making clear 'what information is sought and how it would preclude summary judgment.'" *Jenkins, supra.* As this Court has previously held as a matter of law, Defendant's Personnel Policy was not "intended to create enforceable contract rights," and "there is no material issue of fact that the personnel policy constituted a contract between Elmore County and Ms. Nix." (April 15, 2013 Memorandum and Order, p. 5) Again, there is no further discovery

that Plaintiff currently seeks that would fix that prior deficiency. Therefore, while Plaintiff has stated that she seeks discovery to establish that supervisors and/or employees of Defendant have no authority to change, modify, and interpret the Personnel Policy, or that the Personnel Policy provided no authority to change her employment status, these are moot points because there is no preliminary contractual basis for the Personnel Policy to have such authority. It is also unclear from Plaintiff's filings how such evidence would materially oppose Defendant's Motion for Summary Judgment.

Plaintiff also seeks discovery to establish that any power and authority to change the Personnel Policy has been reserved to the Board of County Commissioners, but this fact is clear from the plain language of the Personnel Policy itself, and thus, further discovery is unnecessary. (See Affidavit of Barbara Steele, Ex. A, p. 7.) Likewise, although Plaintiff seeks discovery to establish that her supervisor, Vance Parsons, could not place Plaintiff on probation past her initial probationary period, she has admitted that the Board of County Commissioners confirmed and approved of Mr. Parsons doing so through her prior affidavit as well.

Regardless of what any further discovery may reveal, Plaintiff has already admitted by affidavit in her prior partial motion for summary judgment that the Elmore County Board of County Prosecutors ratified her placement on probationary status and maintaining her at-will employment status in February 2012 and subsequent termination through a written decision issued June 18, 2012. (Nix Affidavit Supporting Motion for Partial Summary Judgment, ¶ 11.) In the course of that confirmation, the County Commissioners specifically noted that Plaintiff had probationary employee status at the time of her termination. (See Nix Affidavit Supporting Motion for Partial Summary Judgment, Ex. I) They also specifically note, without qualification, that Mr. Parsons placed Plaintiff

on probation in February 2012. (*Id.*) As Plaintiff's own evidence already indicates that the Board of County Commissioners reviewed and confirmed all actions leading up to Plaintiff's termination, including actions of her supervisor, Mr. Parsons, it is unclear how evidence that the Personnel Policy prohibits a supervisor from placing an employee on probationary status and maintaining her at-will status would even exist, seeing as the Board of County Commissioners themselves confirmed the very act of placing Plaintiff on probationary status prior to her termination.

Further, this Court has already held that Plaintiff's supervisor "followed the policy requiring notice prior to discipline which could, and did, include placing her on probationary status as set out on page 33 of Exhibit A to the Steele Affidavit." (April 15, 2013 Memorandum and Order, p. 8.) A plain reading of the Personnel Policy, which Plaintiff already has in her possession and has been previously argued, states clearly that a supervisor has specific authority to impose discipline upon employees, including both placing employees on probationary status or terminating their employment. (Affidavit of Barbara Steele, Ex. A, pp. 32-33.) Thus, this Court did not hold that Mr. Parsons changed or deviated from the Personnel Policy, but rather that he followed the policy as written which allowed both placing Plaintiff on probationary status and ultimately terminating her employment. These actions were subsequently confirmed by the Board of County Commissioners. Thus, any discovery that Plaintiff might obtain regarding the authority to change or interpret the Personnel Policy or to place her on probationary status, would be immaterial to Defendant's Motion for Summary Judgment, and would be inapplicable to stay summary judgment at this time.

CONCLUSION

For the reasons stated above, Defendant Owyhee County requests this Court DENY Plaintiff's Motion for Stay re: Defendant's Motion for Summary Judgment, and to have a hearing and determination regarding Defendant's Summary Judgment Motion.

DATED this 29th day of July, 2013.

NAYLOR & HALES, P.C.

By Tyler D. Williams (FOR)
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy copy:
Honorable Lynn G. Norton
lnorton@adaweb.net;

☒ Via email

E. LEE SCHLENDER
Schlender law offices
2700 Holly Lynn Drive
Mountain Home, Idaho 83647
Idaho Bar #1171/Washington Bar#33921
208-587-1999
leeschlender@gmail.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, **Plaintiff,** **vs.** **ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF** **Defendant.**	**Case No. _2012-1213** **MOTION TO VACATE TRIAL SETTING AND RE-SET**

Comes now the Plaintiff Cherri Nix by her attorney E. Lee Schlender and moves the Court to vacate the trial now set for December 3, 2013.

The basis of this motion is : Plaintiff's counsel has a trial set to commence in Salt Lake City that was a prior setting but not disclosed by Utah counsel until two weeks past, for December 5, 2013.

Defense counsel for Elmore County have stated that they have no objection to this request.

It is respectfully requested that this Motion be heard on August 5, 2013.

Dated this 31 day of July, 2013.

E. Lee Schlender, Attorney for Cherri Nix

E. LEE SCHLENDER
Schlender law offices
2700 Holly Lynn Drive
Mountain Home, Idaho 83647
Idaho Bar #1171/Washington Bar#33921
208-587-1999
leeschlender@gmail.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, Vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO Defendant.	Case No. _2012-1213 NOTICE OF HEARING ON MOTION FOR TO VACATE TRIAL SETTING

TO THE UNDERSIGNED ATTORNEYS AND THE CLERK OF THE COURT:

Please take notice, that the Plaintiff above-named will call on for hearing before the Honorable Lynn G. Norton presiding District Judge, Plaintiff's Moton TO VACATE TRIAL SETTING , on the 5 th day of August , 2013 at 2:00pm at the Elmore County Courthouse, Mountain Home Idaho 83647.

Dated this 3 day of July, 2013.

E. Lee Schlender, Atorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 31 day of July 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing documents, to wit:

MOTION TO VACATE TRIAL SETTING AND NOTICE OF HEARING

to the Attorneys for Elmore County, by the following method:

First Class Mail addressed to:

Bruce Castleton <bjc@naylorhales.com>

yes. X .

Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702

FAX: _____. yes_____.383-9516

E. Lee Schlender
Attorney for Plaintiff Nix

3C

FILED
2013 JUL 31 PM 2:11
BARBARA STEELE
CLERK OF THE COURT
DEPUTY

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Idaho Bar #1171/Washington Bar#33921
208-587-1999
leeschlender@gmail.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,
Vs.

ELMORE COUNTY A POLITICAL

SUBDIVISION OF THE STATE OF IDAHO
Defendant.

Case No. _2012-1213

NIX BRIEF SUPPORTiNG MOTION FOR STAY OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT

SETTING OF THE CASE

Plaintiff Nix filed for summary judgment and this court on April 16, 2013 issued a written Memorandum Decision denying the Motion. The court stated in part:

" Regarding contract disputes at summary judgment, "[w] hen the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury *to* decide whether a contract in fact exists." *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679P.2d 640, 645 (1984). "Interpretation of unambiguous language in a contract is a question of law. Interpretation of an ambiguous contract is a question of fact. Whether a contract is ambiguous is a

question of law." *Cannon v. Perry,* 144 Idaho 728, 731, 170 P.3d 393, 396 (2007). The Idaho Supreme Court has defined contractual ambiguity as "reasonably subject to conflicting interpretation." *Elliott v. Darwin Neibaur Farms, 138* Idaho 774, 779, 69 P.3d 1035, 1040 (2003)."

In summary the Court stated that:

"Regarding contract disputes at summary judgment, "[w] hen the existence of a contract is in issue, and the evidence is conflicting or admits of more than one inference, it is for the jury to decide whether a contract in fact exists." *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 679 P.2d 640, 645 (1984). However, in this case, the Plaintiff has not presented conflicting evidence that the personnel policy was not a contract. There is no admissible evidence-only the Plaintiffs assertions-that a contract exists."

Plaintiff requested permission to appeal, which was denied. The Court was emphatic that it did not consider the case to be without issues of fact, either existing or to be explored upon further proceedings, stating that a re-consideration was one possibility, depending on development of the issues and facts.

Defendant urges the Court to essentially grant summary judgment, not for plaintiff but upon the same pleadings, affidavits and documents, for defendant. Simply stated, their argument is that Elmore County is entitled to a summary judgment since this court denied one to Nix. The motion is not supported by affidavits, only argument.

Doe v. Sisters of the Holy Cross, 126 Idaho 1036, 895 P.2d 1229 (1995) holds that even in cases that appear to raise issues of law, facts are important in determining if legal principles are controlling; a Rule 56(f) motion should have been granted before hearing the summary judgment motion.

Plaintiff served Interrogatories, Requests for Production of Documents and Requests for Admissions on defendant on June 8, 2013. To date no answers have been filed. Likely is that the defendant, realizing that facts would be established by responding favorable to Nix, simply filed instead a Motion for Summary Judgment thereby hoping to avoid having the court before it key facts as to the following:

1. That Elmore County has never had a limitation on the length of time an employee may continue employment.
2. That there is no policy or document providing that employees can be fired without cause.
3. That the term "employee at will" does not appear in any Personnel Policy or related document of Elmore County.
4. That neither her supervisor Mr. Parsons nor any other employee of the county has the power to terminate an employee.
5. That no regular, full time employee has ever been denied an appeal hearing.

6. That no employee has been terminated except for the causes stated in the Manual except for budgetary reasons.
7. That no policy exists of the county stating that regular employees who have served their initial probationary period are at will employees.
8. That no supervisor including that of Nix, Mr. Parsons had any authority to interpret or decide any ambiguity in the Policy Manual.
9. No supervisor had the authority to change the status of Nix from full time, regular employee status to that of at will or other status allowing the county to deny her a pre-termination hearing.
10. Prior to her discharge, Nix was never "on probation" as per any policy of the county which either made her an at will employee or deprived her of the right to a termination hearing.
11. That the Personnel Policy does not state it is part of any employment contract.
12. That Nix never signed an agreement that her employment could be terminated without cause, at any time.
13. That the Policy Manual limits the reasons employees including Nix can be terminated.
14. That county employees were not in fact, treated as at will employees except for purposes of terminating them.
15. That Nix had a property interest in her continued employment with Elmore County.
16. That Elmore County in United States District Court case Sommer v. Elmore County, Case 1:11-cv-00291 advised the court that:

" The only limitation on the at-will employment relationship is that full-time regular and part-time regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees."

17. That placing Nix on probation for a disciplinary reason did not re-classify her as not being a full time employee; that she in fact and law had the right to a hearing.

Brown v. Valley County, 2013 WL 1453368 found such facts involving an identical disclaimer in their Policy Manual as persuasive that Brown was not an at will employee; that he did have a property interest in continued employment. A copy is attached; it is not available as reported in Federal Reporter. The Court reasoned that since Brown was expected to perform in accordance with the Manual, that after the initial probationary period he was not at will; he expressly was to abide by the policy in performing his employment. The Court concluded that the Manual could not be mandatory for Brown but only advisory and discretionary for Valley County. Finally, the counties reliance on the disclaimer was not controlling. As stated therein:

> " But Valley County's argument suffers from a fatal flaw. In essence, Valley County argues Idaho law require a contractual right upon which the employee must rely to rebut the at-will presumption. Yet Bollinger and its predecessors recognized that, in the absence of an express contract, a limitation to the

> at-will employment presumption will be implied where the circumstances surrounding the employment relationship could cause a reasonable person to conclude that the parties intended limitation on discharge."

It is without argument that the "circumstances surrounding the employment relationship" are issues of fact.

The outstanding discovery clearly will give to this court facts upon which to conclude that Nix was not in fact, at-will; that she had a property interest in her continued employment; that she was entitled to a pre-termination hearing; that she was not converted to less than full time status by the actions of her supervisor; that she was entitled to due process as per the Manual hearing and appeal provisions. Additionally, there is no language in the Manual stating Nix was an at will employee.

Issues of fact are relevant to determining the exact nature of the employment relationship and whether employees were fired at any time for reasons other than as stated "for cause" in the Manual; that Nix could not be demoted to less than full time status by her supervisor; that she was entitled to a hearing prior to discharge. These are jury issues.

It is respectfully requested that the Motion for Summary Judgment be stayed pending completion of discovery.

Dated this _____ day of July 2013.

_____
E. Lee schlender law offices
Attorney for Plaintiff Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the ___ day of _____, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit:
PLAINTIFF'S BRIEF SUPPORTING MOTION FOR STAY ; HEARING UPON MOTION FOR SUMMARY JUDMENT AND AFFIDAVIT OF CHERRI NIX

to the Attorneys for Elmore County:
Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702
BY THE FOLLOWING METHOD:
FAX : 383-9516

_____
E. Lee Schlender

2013 WL 1453368
Only the Westlaw citation is currently available.
United States District Court,
D. Idaho.

INTRODUCTION

Jayne BROWN, as Personal Representative of the Estate of Steven P. Brown, Plaintiff,

v.

VALLEY COUNTY, a political subdivision of the State of Idaho; and Gordon Cruickshank, Jerry Winkle and Ray Moore, Valley County Commissioners, in their individual and official capacities, and John Does I–XX, Defendants.

No. 1:12–cv–00057–CWD. | April 9, 2013.

Opinion

MEMORANDUM DECISION AND ORDER

CANDY W. DALE, United States Magistrate Judge.

*1 Steven Brown[1] filed a complaint against Valley County and its three Commissioners on February 8, 2012. The complaint asserts a claim under 42 U.S.C. § 1983, for deprivation of due process arising out of Brown's constitutional property MEMORANDUM DECISION AND ORDER–1 interest in his employment Valley County. Brown's second cause of action arises under the Idaho State Constitution, also alleging a deprivation of his property interest in his employment, which he claims could not be terminated without due process. Brown further contends that Defendants are liable for spoliation of evidence, because they either negligently or intentionally failed to record or preserve the recording of a pre-termination hearing held on February 2, 2011.

Brown moves for partial summary judgment, seeking an order finding that he had a constitutionally protected property interest in his employment relationship with Defendant Valley County. If the Court finds for Brown, he may move forward with his claims. Opposing him, Defendants, who collectively will be referred to as Valley County, seek summary judgment on the grounds that Brown did not have a protected property interest in his continued employment because he was an "at-will" employee. If the Court finds for Valley County, Brown's complaint will be dismissed.

The Court conducted a hearing on February 4, 2013, at which the parties appeared and presented oral argument. The day after the hearing, Defendants filed a Motion for Certification to the Idaho Supreme Court, contending that this case presents an issue appropriate for the Idaho Supreme Court to decide. That motion now has been fully briefed, and will be decided without a hearing. Dist. Idaho L. Rule 7.1(d)(1)(A).

After carefully considering the parties' briefs, the applicable case law, and the record, the Court enters the following order granting Brown's motion for partial summary judgment, and denying Valley County's motion for summary judgment and its motion for certification.

FACTS

The parties stipulated to the following undisputed, material facts. Brown was a Valley County employee from 1998 until February 3, 2011. At the time of his separation, Brown was the Building Department Head for Valley County. During his employment, Valley County promulgated a Policy Manual, effective upon distribution for fiscal year 2004. (Policy Manual, Stipulation Ex. A, Dkt. 22.) Brown relies exclusively upon the Valley County Policy Manual as the basis for his property interest claim. Brown signed an "Acknowledgment of Receipt of New Valley County Personnel Policy Manual" on December 16, 2003. (Acknowledgment, Stipulation Ex. B, Dkt. 22.) This acknowledgment was of the 2004 Policy Manual, which is the only policy manual relevant in this case. On February 3, 2011, Plaintiff's employment was terminated, via a written termination letter.

According to the parties, the following provisions of the Policy Manual are material. First, in bold print on the first page, the Policy Manual contains a disclaimer regarding the creation of a contract of employment:

*2 THIS PERSONNEL POLICY IS NOT A CONTRACT. NO CONTRACT OF EMPLOYMENT WITH VALLEY COUNTY WILL BE VALID UNLESS IT IS SIGNED IN ACCORDANCE WITH PROPER PROCEDURES BY A SPECIFICALLY AUTHORIZED REPRESENTATIVE OF THE GOVERNING BOARD AND UNLESS IT IS SIGNED BY AND CONTAINS THE NAME OF THE EMPLOYEE WHO WOULD BE BENEFITED BY THE CONTRACT.

> CHANGES TO THE POLICIES AND BENEFIT OFFERINGS OUTLINED IN THIS HANDBOOK ARE SUBJECT TO CHANGE AT ANY TIME, WITHOUT NOTICE. CHANGES MAY BE MADE AT THE SOLE DISCRETION OF THE GOVERNING BOARD.

New employees were subject to a ninety day introductory period, during which "either the employee or Valley County may end the employment relationship at-will, with or without cause or advance notice." Otherwise, the Policy Manual classified employees, and defined an employee's employment status as follows:

> Except as otherwise provided in this paragraph, employees of Valley County will not be suspended without pay, demoted with an accompanying change in pay, or discharged from their positions except for cause related to performance of their job duties or other violations of this policy. Cause shall be determined by the employee's supervisor/elected official and shall be communicated in writing to the employee when employee status is changed.
>
> Only suspension without pay, demotion with change of pay, or discharge for cause shall be subject to the appeal procedure set forth in this personnel policy. The appeal procedure is to be construed in a directory [sic] manner.
>
> It is the duty of the appellant to show by clear and convincing evidence that the factual basis for the personnel action is incorrect or that the reasons for the personnel action are contrary to the public interest or violate existing law. Should the appellant establish such basis, the employee's back wages and benefits shall be restored as if the specified action had not been taken.

The Policy Manual established "the right to a hearing in the event of a discharge, demotion with attendant change in pay, or suspension," and outlined those procedures in Section V.

ANALYSIS

1. Motion to Certify

Idaho Appellate Rule 12.3 provides that a United States District Court may certify a question of law to the Idaho Supreme Court if two conditions are met: (1) the question certified is a controlling question of law in the pending action as to which there is no controlling precedent in the decisions of the Idaho Supreme Court, and (2) the immediate determination of the Idaho law with regard to the certified question would materially advance the orderly resolution of the litigation in the United States Court. Idaho App. R. 12.3. As a general matter, the benefits of certification have been held to include: assuring that state law will be applied uniformly and in accordance with the interpretations given by each state's high court; state courts will have the benefit of having the final say on a matter of state law; and, the federal courts can avoid the difficult task of attempting to divine how a state court would rule on a matter of state law. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (noting that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative juridical federalism").

*3 Defendants seek certification of one question: "whether a public employee can have a property interest in employment where a policy manual contains both contract disclaimer language and language to the effect that an employee cannot be discharged except for cause." Defendants claim this is an issue of first impression, and a controlling issue in the case. Defendants are correct that the issue is central to this case. But Defendants are mistaken that it is a "question of law" rising to a level requiring the Idaho Supreme Court to decide it.

This Court is asked to decide whether Brown held a property interest in his continued employment based upon the language in the Valley County Policy Manual. The Court looks to state law to determine the extent of his property interest. There is no dearth of Idaho case law on this issue. The Court is left, then, to apply established Idaho law to the facts of this case. It is not deciding a matter of public policy important to the state, or a controlling question of law that is unresolved in Idaho. *See, e.g., Miller v. Four Winds Intern. Corp.*, 827 F.Supp.2d 1175 (D.Idaho 2011). To the contrary-the Court is interpreting existing Idaho case law on the matter and applying it to the facts, a task the Court does routinely. The Court will deny the motion to certify.

2. Summary Judgment Standards

A principal purpose of summary judgment is to "isolate and dispose of factually unsupported claims...." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). It is "not a disfavored procedural shortcut," but is instead the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an

otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001). To carry this burden, the moving party need not introduce any affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the nonmoving party's case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir.2000).

This shifts the burden to the non-moving party to produce evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 256–57. The non-moving party must go beyond the pleadings and show "by [its] affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 324.

The party bearing the burden of proof at trial "must establish beyond controversy every essential element of its ... claim." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir.2003) (adopting decision of district court "as our own"). A party w ho does not have the burden "may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact." Fed.R.Civ.P. 56(c)(1)(B) (advisory committee's note.)

***4** As a general rule, the "party opposing summary judgment must direct [the Court's] attention to specific triable facts." *S. Cal. Gas Co.*, 336 F.3d at 889. An exception to this rule exists when cross-motions for summary judgment are filed. In that case, the Court must independently review the record for issues of fact. *Fair Housing Council of Riverside Co., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir.2001). Cross-motions for summary judgment—where both parties essentially assert that there are no issues of material fact—does not vitiate the court's responsibility to determine whether disputed issues of material fact are present. *Id.*

In this case, the parties argue vigorously as to their understanding of the Policy Manual. These disagreements are matters of argument and not contested issues of material fact. The parties have stipulated to the material facts, and have included the Policy Manual in their filings.

3. Due Process Claim [2]

The Fourteenth Amendment to the United States Constitution protects individuals from the deprivation of liberty or property by the government without due process. A Section 1983 claim based upon procedural due process contains three elements: (1) a liberty or property interest protected by the United States Constitution; (2) a deprivation of that interest by the government; and (3) a denial of adequate procedural protections. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir.1993). To state a claim under the Due Process Clause, Brown must first establish he possessed a property interest deserving of constitutional protection. *Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.1998); *see also Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997). If a property interest exists, the essential requirements of due process are notice and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill et al.*, 470 U.S. 532, 546 (1985). The Due Process Clause does not create substantive property rights; property rights are defined instead by reference to state law. *Portman*, 995 F.2d at 904.

To determine whether Brown's due process rights were violated, the Court first must determine whether Brown possessed a constitutionally protected property interest in continued employment. *Dyack v. Commonwealth of N. Mariana Islands*, 317 F.3d 1030,

1033 (9th Cir.2003) (citing *Loudermill*, 470 U.S. at 538). To have a property interest, a person must have "a legitimate claim of entitlement to it," and such claim may be based upon a rule or policy that secures an interest in continued employment or that creates a legitimate claim to it. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577, 578 (1972).[3] *See also Sonoda v. Cabrera*, 255 F.3d 1035, 1040 (9th Cir.2001) ("An individual 'has a constitutionally protected property interest in continued employment ... if he has a reasonable expectation or a 'legitimate claim of entitlement' to it, rather than a mere 'unilateral expectation.' ") (citation omitted).

***5** Valley County argues that the disclaimer in the Policy Manual preserved Brown's at-will status under Idaho law, leaving Brown without a constitutionally protected property interest in continued employment. Valley County begins with the premise that the employment relationship itself is a contractual relationship. Because the bold faced disclaimer on the first page of the Policy Manual negates an intent that it become an employment contract, Valley County argues Brown's at-will status was preserved. According to Valley

County, the policies set forth in the Policy Manual were simply pro-employee guidelines that were not mandatory, did not limit the reasons for discharge, and simply created a framework for the employment relationship.

Brown concedes he does not have a contractual right to continued employment, and his complaint does not assert a breach of contract claim. But Brown argues that, despite the lack of a contractual right to continued employment, he held a legitimate claim of entitlement to continued employment based upon the Policy Manual provisions taken as a whole. He points to Section IV(A)(1) of the Policy Manual, which limits discharge "except for cause related to performance of [your] job duties or other violations of this policy." According to Brown, the Policy Manual's provisions, considered as a whole, rebut the presumption that his employment status was "at-will," and gave him a legitimate claim of entitlement to continued employment.

Valley County contends the facts of this case and applicable law are most similar to those in *Lawson v. Umatilla County*, 139 F.3d 690 (9th Cir.1998). Oregon state law codifies the at-will status of all county employees, stating such employees "hold office during the pleasure of the appointing officer." 139 F.3d at 692. Valley County asserts that Oregon's state statute is analogous to Idaho's legal presumption endorsed in Idaho case law that employment is at-will "unless the employee is hired pursuant to a contract that states a fixed term or limits the reasons for discharge." *Bollinger v. Fall River Rural Electric Coop., Inc.*, 272 P.3d 1263, 1267 (Idaho 2012). And in *Lawson*, the county's employment manual contained a disclaimer similar to the disclaimer in this case, which stated: "under no circumstances shall these policies be construed to act as any type of employment contract with any employee" of the county.

Lawson asserted a Section 1983 due process claim, while Umatilla County relied upon the disclaimer and contended Lawson was an at-will employee with no protected property right. The court held that the disclaimer was an "unambiguous statement that the general at-will status of county employees established by [statute] shall not be altered by the provisions" of the policy manual. *Id.* at 693.[4] The court found that the handbook provision stating "[n]o permanent employee shall be disciplined except for violation of established rules and regulations," taken together with the disclaimer and Oregon state law, did not give the employee a property interest in continued employment. In so holding, the court noted that a handbook disclaimer can retain the employee's at-will status even when employment policies provide specific reasons for termination and for an appeal process. *Id.*

***6** Recently, this Court had an opportunity to apply *Lawson* to claims brought by a Power County Sheriff's deputy upon his termination from employment. Power County's policy manual is strikingly similar to Valley County's Policy Manual. *See Harms v. Power County*, Case No. 4:11–cv–00111–EJL–CWD, Mem. Order (Mar. 4, 2013) (Dkt.35).[5] In fact, the contract disclaimer language in Power County's manual is similar to the disclaimer in Valley County's Policy Manual. *Harms*, Mem. Order at 13. Power County moved for summary judgment on Harms's constitutional claims brought under Section 1983,[6] arguing the language in its policy manual preserved Harms's at-will status and he had no constitutionally protected property interest in continued employment, despite a provision requiring cause for termination of employment.

The Court in *Harms* discussed the manual's provisions regarding workplace conduct as well as its disciplinary penalties, finding that the provisions were not all-inclusive and subject to change at any time. Because of the unlimited discretion retained by Power County, the Court found that the manual could not be read to create a protected property interest. *Harms*, Mem. Order at 24. Second, the Court held that, under *Lawson*, the manual's provisions regarding dismissal except for cause failed to create a property interest when construed in conjunction with the disclaimer. *Harms*, Mem. Order at 24–26. But, importantly, Harms signed an acknowledgment form that stated he "understood and agreed" that the handbook was not an employment contract or a guarantee of any particular length or term of employment, that he was an "employee at-will," and that the list of rules contained in the handbook were "illustrative and not all inclusive." As a result, the Court held that it was not just the contractual disclaimer, but also the discretionary language of the manual, and the receipt and acknowledgment form "under which Plaintiff unequivocally renounced a right to anything other than at-will employment," that together precluded Harms from claiming a property interest in continued employment. *Harms*, Mem. Order at 26 and n. 9 (Dkt.35.)[7]

The Court concludes that the facts in *Lawson* and *Harms* are distinguishable from the facts before the Court in this matter, and that the Policy Manual disclaimer did not preserve the at-will status of Brown's employment as a matter of law. Here, the Policy Manual mentions an employee is at-will during

the introductory period. After the 90 day introductory period, there is no mention of an employee retaining the at-will moniker. Instead, employees are told that Valley County's policy requires "cause related to performance of their job duties or other violations of this policy" before an adverse employment action may be taken against an employee. The paragraph requiring cause begins with the phrase: "Except as otherwise provided in this paragraph." The paragraph does not say "except as otherwise provided in this Policy Manual," but rather is confined to that paragraph. Thus, the "for cause" paragraph stands alone, without reference to any other portion of the Policy Manual, and therefore excludes any cross-reference to the disclaimer language or any other provision of the Policy Manual. The reference to the employee's duty to prove that the factual basis for the personnel action is incorrect does not change the requirement that adverse employment actions require cause related to job performance or violation of policy.

*7 Another important difference between this case and both *Lawson* and *Harms* is the lack of an emphatic at-will acknowledgement. Although Brown signed an acknowledgement and receipt form, it simply reiterated that the Policy Manual was "not a contract and cannot create a contract," and that Brown was obligated to perform his job duties in conformance with the provisions of the Policy Manual. There was no acknowledgment like the one Harms signed, which unequivocally stated Harms was employed "at-will." Nowhere in the Policy Manual, other than in the paragraph discussing the introductory period, does it say employees could be discharged for any reason or at any time, without cause. And while Oregon codifies the at-will status of its county employees in a state statute, Idaho does not. Rather, Idaho case law has developed to hold that an employee is presumed to be at-will, but that presumption may be rebutted by express or implied contract. *Bollinger*, 272 P.3d at 1269.

Lastly, although the Valley County Policy Manual includes expectations of performance and rules regarding workplace conduct that are not all inclusive and that may be changed at any time, such facts, together with the disclaimer, were not the only deciding factors in *Harms* for finding Harms's employment was at-will. Rather, the Court was clear that it was the three-part combination of the discretionary disciplinary policies, the contract disclaimer, *and* the at-will acknowledgment which precluded a finding that Harms had a protected property interest in continued employment with Power County, despite the one clause stating Harms could be discharged only for cause. Here, the stool is missing a leg. Other than during the ninety day introductory period, the Policy Manual did not unequivocally state that Brown was an at-will employee.

Although Valley County's policies are subject to change at any time and Valley County has discretion to change them, Brown could only be discharged for "violation of this policy," meaning the policies expressed in the Policy Manual. Further, Brown was expected to perform his job duties "in conformance with the provisions" of the Policy Manual. This leads to the reasonable inference, as Brown argued, that after the ninety day introductory period employment was no longer "at-will" given the mandatory nature of the "for cause" paragraph excluding reference to any other part of the Policy Manual. Further, there was an express requirement that, at least for Brown, adherence to the policies expressed in the Policy Manual was mandatory. The policies cannot, on the one hand, be advisory and discretionary for Valley County, but on the other hand mandatory for Brown.

Valley County next argues that the line of private employer cases cited in and relied upon by the Idaho Supreme Court in *Bollinger v. Fall River Rural Elec. Coop.*, Inc., 272 P.3d 1263, 1269 (Idaho 2012) support its argument that Brown retained his at-will status. The long-standing rule is that employment in Idaho is presumed to be at-will unless the employee is hired pursuant to a contract that states a fixed term or limits the reasons for discharge. *Bollinger*, 272 P.3d at 1269.[8] Valley County argues its disclaimer, which disavowed the creation of a contract of employment, results in Brown's inability to rely upon the Policy Manual to create a contractual right rebutting the at-will presumption. Put another way, without a contract, or a contractual right that rebuts the at-will presumption, Valley County argues the Policy Manual is simply general policy that neither binds Valley County nor constitutes part of the employment agreement.

*8 But Valley County's argument suffers from a fatal flaw. In essence, Valley County argues Idaho law requires a contractual right upon which the employee must rely to rebut the at-will presumption. Yet *Bollinger* and its predecessors recognized that, in the absence of an express contract, a limitation to the at-will employment presumption may be implied where the circumstances surrounding the employment relationship could cause a reasonable person to conclude that the parties intended a limitation on discharge. Bollinger, 272 P.3d at 1269. Statements made and policies promulgated by the employer, whether in an employment manual or otherwise, may give rise to such an implied-in-fact

agreement. *Id.* In other words, an express contract or contract right does not preclude a finding that the at-will presumption has been overcome. *See, e.g., Ray v. Nampa School District,* 814 P.2d 17, 20 (Idaho 1991) (finding verbal statements together with an employee handbook created a factual issue of whether an implied employment contract existed); *Parker v. Boise Telco Federal Credit Union,* 923 P.2d 493, 496–97 (Idaho Ct.App.1996) (finding that the lack of a written agreement did not mean there was no contract of employment; an employment contract exists by virtue of the employment relationship itself, of which the manual may be a part).

The absence of a contract, although relevant, is not dispositive of Brown's procedural due process claim. *Perry v. Sindermann,* 408 U.S. 593, 599 (1972); *see also Harms,* Mem. Order at 17 (stating that the absence of a contractual right to continued employment does not necessarily lead to a finding that the employee lacked a property interest in continued employment). The United States Supreme Court in *Perry* explained that the concept of " 'property' denotes a broad range of interests that are secured by existing rules or understandings. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support h is claim of entitlement to the benefit and that he may invoke at a hearing." *Perry,* 408 U.S. at 601 (citing *Roth,* 408 U.S. at 577).

Stated another way, the lack of an express contract, which Brown concedes is disclaimed by the Policy Manual, does not determine the outcome of Brown's due process claim; but the Policy Manual is relevant for determining whether Brown may claim a property right in continued employment. *See Sommer v. Elmore County,* No. 1:11–cv–00291–REB, 2012 WL 4523449 (D.Idaho Sept. 30, 2012)[9] (expressly recognizing that Elmore County's policy manual was not a contract, but relying upon its language to determine whether the plaintiff's due process claim was subject to dismissal); *Cameron v.. Owyhee County,* No. CV09–423–REB, 2011 WL 2945820 (D.Idaho July 20, 2011) (finding that the express at-will provision stated clearly in the personnel handbook, not the lack of a contract, was determinative of the due process claim); *Thompson v. City of Idaho Falls,* 887 P.2d 1094 (Idaho Ct.App.1994) (relying upon the language of the policy manual, not whether a contract existed, to determine the plaintiff's property interest claim).

*9 Valley County's argument that its disclaimer disposes of Brown's due process claim also distorts the rule applicable under *Bollinger* and its predecessors. *See Metcalf,* 778 P.2d at 746. Valley County's argument, by logical extension, would result in the following application of Idaho's at-will employment rule: "unless an employee is hired pursuant to a contract, then employment is at-will." But the rule requires reference to the employee handbook or other policy manual to ascertain if it either states employment is for a specified term, or contains limitations on an employer's ability to discharge an employee.

The Court finds that, when viewed as a whole, the Valley County Policy Manual places limitations on the reasons for discharge sufficient to create a property interest in continued employment. Neither the contract disclaimer nor the discretionary nature of the Policy Manual's disciplinary rules are sufficient to negate the effect of the stand-alone provision requiring cause related to performance of job duties or other violations of the policy for termination. *See Harkness,* 715 P.2d at 1287 (citing *Maloney v.. Sheehan,* 453 F.Supp. 1131, 1141 (D.Conn.1978) ("A law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged. For example, if discharge can only be for 'just cause,' an employee has a right to continued employment until there is just cause to dismiss him.").[10]

Valley County's contention that its disclaimer is sufficient to preserve the at-will employment relationship is unavailing. In the employment manual cases where the Idaho appellate courts found the at-will employment relationship preserved, the manuals did not just disclaim the existence of a contract; they also stated clearly either in the disclaimer or somewhere else, such as in the text of the manual or in the acknowledgment, that employment was at-will. *Bollinger,* 272 P.3d at 1267 (manual in effect at time of discharge contained a provision stating that in the absence of a separate written contract fixing a term of employment, employees are at-will and may be terminated by the company at any time); *Jenkins v. Boise Cascade Corp.,* 108 P.3d 380, 387–88 (Idaho 2005) (manual stated that an employee could be discharged with or without cause and that the handbook was not part of the employment contract); *Jones v. Micron* Technology, Inc., 923 P.2d 486 (Idaho 1996) (employee signed a written agreement acknowledging his employment was not for any definite period and that his employment could be terminated without cause at any time, thereby negating anything in the employment manual to the contrary); *Mitchell v. Zilog, Inc.,* 874 P.2d 520, 524 (Idaho 1994) (manual stated that it was not to be construed as a contract, and elsewhere that

employment was at-will); *Sorensen v. Comm Tek, Inc.*, 799 P.2d 70, 73–74 (Idaho 1990) (manual had both a disclaimer that indicated employment was at-will, and elsewhere that the policies did not confer any right or privilege to remain an employee). Here, in contrast, the lack of any express "at-will" language, together with the stand-alone paragraph requiring cause related to job performance or other violation of policy, rebuts the at-will presumption as a matter of law.[11]

CONCLUSION

***10** For the above reasons, the Court finds as a matter of law that the Valley County Policy Manual, viewed as a whole, is not susceptible to two otherwise reasonable interpretations. While the Policy Manual does state it is not a contract, elsewhere in the Policy Manual, and in a self-contained paragraph, it states that employees past their introductory period could be discharged only for cause related to performance of job duties or other violations of the policies set forth in the Policy Manual. Although Valley County retained discretion to change the policies, Brown was expressly required to follow the policies stated in the Policy Manual. And Brown did not sign an acknowledgment stating he understood his employment was "at-will," nor did the Policy Manual contain any other provision explaining Brown could be terminated from employment for any reason, or for no reason, or at any time or manner. Because the Policy Manual limited the reasons for which Brown could be discharged, Brown was not an at-will employee and had a protected property interest in his continued employment.

ORDER

NOW THEREFORE IT IS HEREBY OR DERED:

1) Plaintiff's Motion for Partial Summary Judgment (Dkt.20) is **GRANTED.**

2) Defendants' Motion for Summary Judgment (Dkt.21) is **DENIED.**

3) Defendants' Motion for Certification (Dkt.39) is **DENIED.**

4) The Court will conduct a telephonic scheduling conference with the parties to establish new case management deadlines in light of the Court's Order. A separate Notice of Hearing will be forthcoming.

Footnotes

1 Steven Brown passed away on August 15, 2012, and his wife, Jayne Brown, was appointed personal representative of his estate. (Dkt.27.) Jayne Brown was substituted as Plaintiff by the parties' stipulation. (Dkt.31.)

2 The parties did not separately brief the due process claim asserted under the Idaho Constitution. It appears the parties agree that the at-will status of Brown's employment is determinative of both constitutional claims at this juncture.

3 In *Roth*, the Supreme Court recognized that a public employee who may be discharged only for cause has a constitutionally protected property interest in his tenure and cannot be deprived of his employment without due process. *Roth*, 408 U.S. at 578; *see also Gilbert v. Homar*, 520 U.S. 924, 928–29 (1997). However, the Supreme Court held in *Roth* that the university professor did not have a property interest in re-employment for the next year, in part because "no state statute or University rule or policy" secured his interest in re-employment. 408 U.S. at 578. Therefore, it stands to reason that the converse is true——a policy may establish an interest in re-employment or continued employment, as the case may be.

4 Brown cites to Judge Pregerson's dissent in *Lawson*, wherein he disagreed with the majority and would have found that Lawson could only be fired for cause based upon the language of the policy manual. Judge Pregerson viewed the disclaimer as precluding only breach of contract claims, not due process claims. *Id.* at 695. The Court finds it unnecessary to resolve which side-the majority or the dissent——had the better reasoned view in *Lawson*, because it finds the facts in *Lawson* distinguishable, as discussed later in this opinion.

5 *Harms* was decided after the Court conducted oral argument in this matter, but the facts and law discussed are directly applicable to this case, and the Court would be remiss if discussion of the decision was not included.

6 Unlike Brown, Harms brought additional claims against Power County for breach of employment contract, and violation of Idaho state law, specifically the Idaho Personnel Act.

7 The plaintiff filed a notice of appeal in *Harms* on April 1, 2013.

8 The following cases set forth the same general principle: *Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 387–88 (Idaho 2005); *Mitchell v. Zilog, Inc.*, 874 P.2d 520, 524–25 (Idaho 1994); *Sorensen v. Comm Tek, Inc.*, 799 P.2d 70, 73–74 (Idaho 1990); *Metcalf*

v. Intermountain Gas Co., 778 P.2d 744, 747 (Idaho 1989); *Watson v. Idaho Falls Consol. Hosp., Inc.*, 720 P.2d 632, 635–36 (Idaho 1986); *Jones v. Micron Tech., Inc.*, 923 P.2d 486, 489–90 (Idaho Ct.App.1996).

9 The Court decided the defendants' motion to dismiss, not a motion for summary judgment, in the opinion c it ied herein. A motion for summary judgment is now pending, but has not been decided. The Court does not intend for any part of this opinion to comment on the facts before the Court on the motion for summary judgment in the *Sommer* matter.

10 Valley County relies upon *Zilog* for its claim that, if the Court finds the disclaimer insufficient to negate the for-cause language, both motions should be denied because there is a question of fact for the jury to decide. However, the court in *Zilog* decided a breach of contract claim. In so doing, the court noted that, if an employee handbook negated an intent to create a contract, a court may conclude from a review of the handbook that whether the handbook was intended by the parties to impliedly express a term of the employment agreement is a question of fact. *Zilog*, 874 P.2d at 524. By deciding that the disclaimer negated an intent to form an employment contract, there was no factual issue. *Id.* At 525. Here, in contrast, the Court is not deciding whether there was or was not a contract, because this case does not involve a breach of contract claim. The Court has previously explained that the existence of a contract, while it may be relevant, is not solely determinative of a due process claim asserting a property interest in continued employment.

11 It would have been a simple task to revise the manual and include language notifying employees they could be discharged for any reason, that their employment was "at-will," or that they could be discharged without cause___or any other similar language used by the employers in the cases cited above. *See e.g., Parker*, 923 P.2d at 495, 496–97(court examined revised policy manual, and concluded the second manual, which stated "all employment was at-will," preserved the employer's right to terminate Parker at-will).

End of Document

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BARBARA STEELE
CLERK OF THE COURT
DEPUTY

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF

Defendant.

Case No. _2012-1213

PLAINTIFF'S AFFIDAVIT RE: Opposing Motion for Summary Judgment ; Admitted Requests For Admissions

Cherri Nix, Plaintiff herein, being duly sworn on oath, does state:

1. I am the Plaintiff in the above-entitled action and have personal knowledge of the facts set for herein.

2. Attached hereto as Exhibit A are Plaintiff's First Interrogatories , Request for Production of Documents and First Request for Admissions.

3. Exhibit A was served on the Attorneys for Elmore County on June 17, 2013. A true copy of the fax transmission confirmation is attached hereto as Exhibit B.

4. That Defendant did not file a response, answer or objection to the Requests for Admissions as contained in Exhibit A, within 30 days after service of the Request for Admissions; that as of this date, no such response, objection or answer has been filed.

5. That as per I.R.C.P. 36 (a), all the Requests for Admissions are ADMITTED for all purposes in this cause and action.

6 . That the Admitted Requests for Admissions established law and facts

sufficient to deny the Motion for Summary Judgment filed herein and enter judgment for me on all issues of liability.

7. Admissions are the following:

ADMISSIONS TO BE READ TO THE JURY

1. Plaintiff did not sign any document approved and authorized by the Elmore County Commissioners, stating that she understood and/or agreed that the Elmore County Policy Manual was not a guarantee of any particular length or term of employment.

2. Only an appointed, elected official of Elmore County or a politic body of such elected officials, has the authority to change or alter any provision of the Elmore County Personnel Policy .

3. Only the Elmore County Commissioners have the authority to provide an interpretation of the Elmore County Personnel Policy in the event any provision thereof is deemed to be ambiguous.

4. The Elmore County Commissioners did not by any specific ruling, decision or order state prior to June 2012 that Plaintiff was at the time of her termination on probation in accordance with that section of the ECPP entitled "Employee Classification, compensation and Benefits", sub-section B. Probationary Period .

5. Elmore County's Personnel Policy can be changed only after notifying elected officials and at the discretion of the Board of County Commissioners.

6. Neither Mr. Vence Parsons or any other supervisor of Plaintiff notified in writing, any elected official of Elmore County of any Elmore County personnel of a policy change regarding Plaintiff, prior to her termination of employment.

7. The Elmore County Personnel Policy places limitations on the reasons an employee may be discharged and terminated.

8. The Elmore County Personnel Policy contains all of the causes related to performance of job duties or other violations of the policy as grounds for termination , adopted or ordered by the Elmore County Commissioners prior to the Plaintiff's termination.

9. The Elmore County Personnel Policy does not state that it is not part of any type of employment contract.

10. The Elmore County Personnel Policy does not state in any provision thereof, that

employees are at-will .

11. Plaintiff did not sign any agreement between her and the Elmore County Commissioners specifically stating that her employment could be terminated without cause at any time.

12. No supervisor of Plaintiff had vested authority to change the status of Plaintiff from that of a full-time employee.

13. The Elmore County Personnel Policy is the only policy document of Elmore County stating the reasons for which Plaintiff could be terminated and/or discharged.

14. No employee of Elmore County has in the past twenty years
been terminated and/or discharged for any reason other than those stated in the Elmore County Personnel Policy .

15. The Elmore County Personnel Policy does not state in any provision thereof, that employees may be terminated without cause.

16. The Elmore County Personnel Policy does not state that employees may be terminated at any time for reasons not stated in that document.

17. Plaintiff had a property interest in her employment regardless of any contractual right created by the Elmore County Personnel Policy .

18.It is the contention of Elmore County in this case that unless Plaintiff was hired pursuant to a contract, her employment was at-will.

19. Prior to the month of June 2012, no elected official of Elmore County advised Plaintiff orally or in writing that she was an employee at-will.

20. Plaintiff was a full time employee of Elmore County at the time of her termination.

21. Plaintiff's probationary period ordered by her supervisor Vence Parsons on February 1, 2012 was for a disciplinary reason.

22. Plaintiff successfully completed her first hire probationary period one year after the calendar year 2007 in which she was hired.

23. Vence Parsons was without authority to change, modify or establish any employment policy of Elmore County .

24. Only the Elmore County Commissioners have the authority to change the terms and conditions of the Elmore County Personnel Policy which must be by an express writing.

25. Only the Elmore County Commissioners have the authority to interpret the Elmore County Personnel Policy with respect to the reasons for employee termination.

26. Vence Parsons had no vested authority to change the status of Plaintiff from a full time employee as defined in the Elmore County Personnel Policy .

27. Vence Parsons at no time between 2010 and this date, was an elected official of Elmore County.

28._ Vence Parsons in 2012 was at all times relevant to this action, an employee of Elmore County and subject to the Elmore County Personnel Policy .

29. The Elmore County Personnel Policy contains no statement other than in the paragraph discussing the introductory period of employment, that employees can be discharged for any reason or at any time, without cause.

30. No employee of Elmore County including supervisors, have the authority to resolve for any employment issue, any express or implied ambiguity in The Elmore County Personnel Policy .

31. Plaintiff was not advised of her at will status as an employee, other than by those notifications authored by Vence Parsons, her supervisor.

32. Elmore County represented to the United States District Court for the District of Idaho in Sommer v. Elmore County, et al Case 1:11-cv-00291-REB that:

" The only limitation on the at-will employment relationship is that full-time regular and part-time regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees."

33. After serving her initial first-hire probationary period, Plaintiff was a full-time employee in accordance with the employee classification system provided by the Elmore County Personnel Policy.

34. The Elmore County Commissioners did not by an official act, change the employment status of Plaintiff from being a full-time employee, until date of her termination.

35. No act by an elected official of Elmore County changed the Elmore County Personnel Policy regarding the classification of employees as full-time or otherwise, between January 1, 2013 and the date of plaintiff's termination of employment.

36. Employees placed on disciplinary probation as per the Elmore County Personnel Policy are not automatically re-classified as not being full-time employees.

37. Full-time employees placed on disciplinary probationary status are not first-hire employees subject to the probationary period stated on Pages 14 and 15 of the Elmore County Personnel Policy .

Dated this 6 day of August, 2013.

Cherri Nix , Plaintiff herein

VERIFICATION

STATE OF IDAHO,)
) ss.
COUNTY OF ELMORE,)

Cherri Nix , being first duly sworn, deposes and states that she is the plaintiff named in the above-entitled action; that she has read the foregoing Affidavit and believes the facts therein stated to be true to the best of her knowledge.

Cherri Nix

SUBSCRIBED AND SWORN to before me this 6 day of August 2013.

E. LEE SCHLENDER NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho,
Residing at Mountain Home, Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the ~~25~~ 5 day of ~~JANUARY~~ AUGUST, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit:

AFFIDAVIT OF CHERRI NIX OPPOSING MOTION FOR SUMMARY JUDGMENT AND CERTIFICATE OF SERVICE OF DISCOVERY

to the Attorneys for Elmore County, by the following method:

First Class Mail addressed to: yes X.

Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702

FAX: _____. yes_____.383-9516

H. Lee Schlender
Attorney for Plaintiff Nix

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.
ELMORE COUNTY,

Defendant .

Case No. __CV-2012-1213

Plaintiff's First Interrogatories,
Request for Production of Document and
First Request for Admissions

WILL YOU PLEASE TAKE NOTICE that Plaintiff herein requests Defendant above named to answer the following Interrogatories within thirty days from the date of service herein in conformance with all provisions of Rule 33 of the Idaho Rules of Civil Procedure.

In answering these Interrogatories, furnish all information available to you including information in the possession of you and your attorneys, investigators, experts, etc., retained by you and your attorneys (not merely information known of

Nix Affidavit of August 6, 2013
Exhibit A,
Plaintiff's First Interrogatories,
Request for Production of Documents and Request for Admissions
June 18, 2013.

your own personal knowledge) accountants, advisors or other persons directly or indirectly employed by or connected with you or your attorneys and anyone else otherwise subject to your control.

In answering these Interrogatories, you must make a diligent search of your records and of other papers and materials in your possession or available to you or your representatives. If an Interrogatory has subparts, answer each part separately and in full, and do not limit your answer to the Interrogatory as a whole. If these Interrogatories cannot be answered in full, answer to the extent possible, specify the reason for your inability to answer the remainder, and state whatever information and knowledge you have regarding the unanswered portion. With respect to each Interrogatory, in addition to supplying the information asked for and identifying the specific documents referred to, identify and describe all documents to which you refer in preparing your answers.

These Interrogatories are deemed continuing and your answers thereto must be supplemented, to the maximum extent authorized by law and the applicable rules, as additional information and knowledge becomes available or known to you.

DEFINITIONS

Unless otherwise indicated, the following definitions will be applicable to these Interrogatories:

A. "Person" means any natural person, corporation, partnership, proprietorship, association, governmental entity, agency, group, organization, or group of persons.

B. The word "Document" means every writing or record of every type and description that is or has been in your possession, custody, or control or of which you have knowledge, including but not limited to emails, correspondence, memoranda, tapes, stenographic or handwritten notes, studies, publications, books, pamphlets, pictures, drawings and photographs, films, microfilms, voice recordings, maps, reports, surveys, minutes or statistical compilations, or any other reported or graphic material in whatever form, including

copies, drafts, and reproductions. "Document" also refers to any other data compilations from which information can be obtained, and translated, if necessary, by you through computers or detection devices into reasonably usable form.

C. To "identify" a "document" means to provide the following information irrespective of whether the document is deemed privileged or subject to any claim of privilege:

1. The title or other means of identification of each such document;

2. The type of document (e.g., letter, memorandum, record);

3. The date of each such document;

4. The author of each such document;

5. The recipient or recipients of each such document, including but not limited to, Defendants or anyone who purports to represent the Defendant;

6. The present location of any and all copies of each such document in the care, custody, or control of Defendant;

7. The names and current addresses of any and all persons who have custody or control of each such document or copies thereof; and

8. If all copies of the document have been destroyed, the names and current addresses of the person or persons authorizing the destruction of the document and the date the document was destroyed.

In lieu of "identifying" any document, it shall be deemed a sufficient compliance with these interrogatories to attach a copy of each such document to the answers hereto and reference said document to the particular interrogatory to which the document is responsive.

D. To "identify" a natural person means to state that person's full name, title, or affiliation, and last-known address and telephone number. To "identify" a person that is a business, organization, or group of persons means to state the full name of such business, organization, or group of persons, the form of the business, organization, or group of persons

(e.g., government agency, corporation, partnership, joint venture, etc.), and to "identify" the natural person who would have knowledge of the information sought by the interrogatory.

E. "Defendant," "you" or "your" refers to, without limitation Inc. Elmore County, its agents, employees and commissioners .

F. Plaintiff refers to, without limitation, the named Plaintiff Cherri Nix.

G. Complaint" refers to the Complaint filed by the Plaintiff in this action.

H. The Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A may be referenced herein as the ECPP or other term, such as Employment Policy or Policy.

ALSO PLEASE TAKE NOTICE that Plaintiff herein, pursuant to Rule 34 of the Idaho Rules of Civil Procedure, requests the production of documents as hereinafter described, at the office of the undersigned, E. Lee Schlender, counsel for Plaintiffs, within thirty days of service hereof. Compliance with this request may be made by mailing copies of the requested documents to the offices of E. Lee Schlender, 2700 Holly Lynn Drive, Mountain Home, Idaho 83647, within the requisite time period above described.

This request is intended to cover all documents in the possession of Defendant. or subject to Defendant's custody and control, whether located in Defendant's offices, or located in some other place.

IN THE EVENT ANY DOCUMENT OR WRITING IS NOT PRODUCED BY REASON OF A CLAIM OF PRIVILEGE OR CONFIDENTIAL INFORMATION, STATE THE EXACT BASIS OF THAT CLAIM. ALSO, NAMES AND ADDRESSES MAY BE REDACTED FOR PURPOSES OF CONFIDENTIALITY, AS LONG AS A DATE OR OTHER INFORMATION PROVIDES SUFFICIENT LANGUAGE TO DETERMINE THE NATURE OF THE DOCUMENT; FOR EXAMPLE, AS A TERMINATION, DISCHARGE, ETC.

ALSO PLEASE TAKE NOTICE that Plaintiff Requests Answers to the Request of Admissions contained herein, pursuant to the Idaho Rules of Civil Procedure.

PLAINTIFFS FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

INTERROGATORY NO. I.

State the name of any employee of Elmore County who within ten years from date of this interrogatory, was dismissed and/or terminated from employment for conduct or violation of any rule , other than those stated under Rules of Employee Conduct of the Elmore County Personnel Policy, pages 9 through 13 thereof which Policy is attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

INTERROGATORY NO. 2.

For each person named in Interrogatory No. 1 , state the conduct, which resulted in that employee being terminated and/or dismissed.

INTERROGATORY NO. 3.

State which person or persons, if any as named in answer to Interrogatories 1 and 2 a full-time employee of Elmore County at the time of the termination and/or dismissal.

REQUEST FOR PRODUCTION OF DOCUMENTS NO 1.

Provide a copy of the final Order and/or Decision terminating and/or dismissing any person named in answer to Interrogatories 1 and 3.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2.

Provide a copy of the final Order and/or decision terminating any employee of Elmore County for any reason whatsoever, for the last ten years. For purposes of privacy, unless the name is one provided in answer to Interrogatories 1 and 3, the name of the terminated individual may be redacted from the document or documents of dismissal and/or termination.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 3.

Provide a copy of every Rule of Conduct adopted and/or promulgated by Elmore County for its employees for the last ten years, other than those stated Rules of Employee Conduct of the Elmore County Personnel Policy, pages 9 through 13 thereof which Policy is attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.
If none exists, please so state.

INTERROGATORY NO. 4.

State what Rule or Rules of Conduct where relied upon by Elmore County for the termination and/or dismissal of any employee for the past ten years, other than those Rules of Employee Conduct of the Elmore County Personnel Policy, pages 9 through 13 thereof, which Policy is attached to the affidavit of Barbara Steele, dated March 4, 2013 as Exhibit A.

INTERROGATORY NO. 5.

State the name of each full-time employee of Elmore County terminated and/or dismissed by the County in the past ten years who was not given an Appeal Hearing as provided by the Elmore County Personnel Policy, pages 9 through 13 thereof, which Policy is attached to the affidavit of Barbara Steele, dated March 4, 2013 as Exhibit A. pages 33 and 34 thereof.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 4.

Provide a copy of each Order and/or Decision terminating any employee in the manner as described in Interrogatory No. 6 ; any full-time employee not given an Appeal Hearing. ? If none exists, please so state.

INTERROGATORY NO. 6.

State the limitation on time or length of employment if any of any full-time Elmore County employee, as the same is stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 5.

Provide a copy of every document stating any Policy adopted by Elmore County in the past ten years which states a date and/or time limitation on the employment of full-time employees of the County, other than what may be stated expressly or implied, in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A . If it does not exist, please so state.

INTERROGATORY NO. 7.

State the title and office of each and every elected and/or non-elected person who for the past ten years has held the authority to terminate and/or dismiss any full-time employee of Elmore County.

INTERROGATORY NO. 8.

State the title and office of each and every elected and/or non-elected person who for the past ten years has held the authority to terminate and/or dismiss any employee of Elmore County during the first year of their employment while they were on probationary status.

INTERROGATORY NO. 9.

State the names of those employees of Elmore County who while on first hire probationary status have been granted a pre-deprivation hearing prior to final dismissal as an employee, for the past ten years.

INTERROGATORY NO. 10.

State if the term "employee at will" or any similar phrase is stated or used in any Personnel Policy of Elmore County, including the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR PRODUCTION NO. 6.

Provide a copy of each and every writing or document described or named in answer to Interrogatory No. 10.

INTERROGATORY NO. 11.

Identify any writing of any kind, which constitutes a decision, or policy of the Elmore County Commissioners in the past ten years, which states a date and/or time limitation on the employment of full-time employees of the County. ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO. 7.

Provide a copy of any document or writing identified in answer to Interrogatory No. 11.

INTERROGATORY NO. 12.

State what document considered as a policy or practice applicable to Elmore County employees adopted by the Elmore County Commissioners by vote and/or signature in the past ten years which states that any employee may be terminated and/or dismissed without cause. In answering this Interrogatory, if reference is made to a document believed to imply dismissal without cause, so identify the document and language therein. ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO. 8.

Provide a copy of each document or writing identified or otherwise described in answer to Interrogatory No. 12.

INTERROGATORY NO. 13.

State the name of any elected or non-elected person or political entity and/or body that Elmore County allows directly or indirectly, to change any term or condition of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

INTERROGATORY NO. 14.

State if any non-elected official of any department of the Elmore County government or staff, may terminate any employee in a specific department.

INTERROGATORY NO. 15.

Does there exist any written policy, letter or document issued and/or adopted by the Elmore County Commissioners in the past ten years that states any employee of Elmore County can be terminated and/or dismissed for any reason other than those set forth in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO 9.

Provide a copy of any document identified in your answer to Interrogatory No. 15.

INTERROGATORY NO. 16.

Does there exist any written policy, letter or document issued and/or adopted by the Elmore County Commissioners in the past ten years that states any employee of Elmore County can be terminated and/or dismissed without cause ? If it does not exist, please so state.

REQUEST FOR PRODUCTION NO. 10.

Provide a copy of each item identified in answer to Interrogatory No. 16.

INTERROGATORY NO. 17.

Did the supervisor of the Plaintiff have the authority as per any law or policy of Elmore County to change her status from any type of employment other than full-time ?

REQUEST FOR PRODUCTION NO. 11.

Provide a copy of any document stating the authority of Plaintiff's supervisor to change her status from that of a full-time employee, if any exists. If it does not, please so state.

INTERROGATORY NO. 18.

State the section and paragraph of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A , by which the Plaintiff was placed on probationary status by her supervisor.

INTERROGATORY NO. 19.

State what document, writing or policy of Elmore County provided authority for the supervisor of Plaintiff to determine and/or establish, that her status after her initial first hire employment period expired, was that of an at-will employee.

REQUEST FOR PRODUCTION NO. 12.

Provide a copy of any item described or named in Interrogatory No. 19.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 13.

Provide a copy of each and every document which sets forth the acts or actions of plaintiff other than as stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, for which she could be dismissed and/or terminated.

INTERROGATORY NO. 19.

State what section and/or provision of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, provides that probationary employees are "at-will employees."

INTERROGATORY NO. 20.

Was Plaintiff terminated and/or dismissed from employment by Elmore County without further pay ?

INTERROGATORY NO. 21.

Name the page, section and paragraph of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, which was relied upon by her supervisor as authority to change her status from other than that of a full-time employee prior to her termination.

PLAINTIFFS FIRST REQUEST FOR ADMISSIONS

FIRST REQUEST FOR ADMISSION NO. 1

Admit that Plaintiff did not sign any document approved and authorized by the Elmore County Commissioners, stating that she understood and/or agreed that the Elmore County Policy Manual was not a guarantee of any particular length or term of employment.

REQUEST FOR ADMISSION NO. 2.

Admit that only an appointed , elected official of Elmore County or a politic body of such elected officials, has the authority to change or alter any provision of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 3.

Admit that only the Elmore County Commissioners have the authority to provide an interpretation of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A. in the event any provision thereof is deemed to be ambiguous.

REQUEST FOR ADMISSION NO. 4.

Admit that the Elmore County Commissioners did not by any specific ruling , decision or order state prior to June 2012 that Plaintiff was at the time of her termination on probation in accordance with that section of the ECPP entitled "Employee Classification, compensation and Benefits", sub-section B. Probationary Period ; all as found on page 14 of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 5.

Admit that Elmore County's Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A , can be changed only after notifying elected officials and at the discretion of the Board of County Commissioners.

REQUEST FOR ADMISSION NO. 6.

Admit that no neither Mr. Vence Parsons or any other supervisor of Plaintiff notified in writing, any elected official of Elmore County of any Elmore County personnel policy change regarding Plaintiff, prior to her termination of employment. If you deny this request, provide a copy of any such notification.

REQUEST FOR ADMISSION NO. 7.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A places limitations on the reasons an employee may be discharged and terminated.

REQUEST FOR ADMISSION NO. 8.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A contains all of the causes related to performance of job duties or other violations of the policy as grounds for termination , adopted or ordered by the Elmore County Commissioners prior to the Plaintiff's termination.

REQUEST FOR ADMISSION NO. 9.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state that it is not part of any type of employment contract.

REQUEST FOR ADMISSION NO. 10.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state in any provision thereof, that employees are at-will .

REQUEST FOR ADMISSION NO. 11.

Admit that Plaintiff did not sign any agreement between her and the Elmore County Commissioners specifically stating that her employment could be terminated without cause at any time.

REQUEST FOR ADMISSION NO. 12.

Admit that no supervisor of Plaintiff had vested authority to change the status of Plaintiff from that of a full-time employee. If denied, provide a copy of the decision, policy or order of the Elmore County Commissioners granting that authority to any supervisor.

REQUEST FOR ADMISSION NO. 13.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A is the only policy document of Elmore County stating the reasons for which Plaintiff could be terminated and/or discharged.

REQUEST FOR ADMISSION NO. 14.

Admit that in no employee of Elmore County has in the past twenty years been terminated and/or discharged for any reason other than those stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 15.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state in any provision thereof, that

employees may be terminated without cause.

REQUEST FOR ADMISSION NO. 16.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state that employees may be terminated at any time for reasons not stated in that document.

REQUEST FOR ADMISSION NO. 17.

Admit that plaintiff had a property interest in her employment regardless of any contractual right created by the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 18.

Admit that it is the contention of Elmore County in this case that unless Plaintiff was hired pursuant to a contract, her employment was at-will.

REQUEST FOR ADMSSION NO. 19.

Admit that prior to the month of June 2012, no elected official of Elmore County advised Plaintiff orally or in writing that she was an employee at-will.

REQUEST FOR ADMISSION NO. 20.

Admit that plaintiff was a full time employee of Elmore County at the time of her termination.

REQUEST FOR ADMISSION NO. 21.

Admit that plaintiff's probationary period ordered by her supervisor Vence Parsons on February 1, 2012 was for a disciplinary reason.

REQUEST FOR ADMISSION NO. 22.

Admit that plaintiff successfully completed her first hire probationary period one year after the calendar year 2007 in which she was hired.

REQUEST FOR ADMISSION NO. 23.

Admit that Vence Parsons was without authority to change, modify or establish any employment policy of Elmore County .

REQUEST FOR ADMISSION NO. 24.

Admit that only the Elmore County Commissioners have the authority to change the terms and conditions of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, which must be by an express writing.

REQUEST FOR ADMISSION NO. 25.

Admit that only the Elmore County Commissioners have the authority to interpret the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A with respect to the reasons for employee termination.

REQUEST FOR ADMISSION NO. 26.

Admit that Vence Parsons had no vested authority to change the status of Plaintiff from a full time employee as defined in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 27.

Admit that Vence Parsons at no time between 2010 and this date, was an elected official of Elmore County.

REQUEST FOR ADMISSION NO. 28.

Admit that Vence Parsons in 2012 was at all times relevant to this action, an employee of Elmore County and subject to the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

REQUEST FOR ADMISSION NO. 29.

Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A contains no statement other than in the paragraph discussing the introductory period of employment, that employees can be discharged for any reason or at any time, without cause.

REQUEST FOR ADMISSION NO. 30

Admit that no employee of Elmore County including supervisors, have the authority to resolve for any employment issue, any express or implied ambiguity in
The Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR ADMISSION NO. 31.

Admit that Plaintiff was not advised of her at will status as an employee, other than by those notifications authored by Vence Parsons, her supervisor.

REQUEST FOR ADMISSION NO. 32.

Admit that Elmore County has represented to the United States District Court for the District of Idaho in Sommer v. Elmore County, et al Case 1:11-cv-00291-REB that:

" The only limitation on the at-will employment relationship is that full-time regular and part-time regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees."

REQUEST FOR ADMISSION NO. 33.

Admit that after serving her initial first-hire probationary period, Plaintiff was a full-time employee in accordance with the employee classification system provided by the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

REQUEST FOR ADMISSION NO. 34.

Admit that the Elmore County Commissioners did not by an official act, change the employment status of Plaintiff from being a full-time employee, until date of her termination.

REQUEST FOR ADMISSION NO. 35

Admit that no act by an elected official of Elmore County changed the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A. regarding the classification of employees as full-time or otherwise, between January 1, 2013 and the date of plaintiffs termination of employment.

REQUEST FOR ADMISSION NO. 36

Admit that employees place on disciplinary probation as per the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A are not automatically re-classified as not being full-time employees.

REQUEST FOR ADMISSION NO. 37

Admit that full-time employees placed on disciplinary probationary status are not first-hire employees subject to the probationary period stated on Pages 14 and 15 of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A .

Dated this 17th day of June, 2013.

E. Lee Schlender, Attorney for Plaintiff Nix

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that upon the 18 day of June, 2013, the undersigned attorney, sent/delivered a true and correct copy of the foregoing document, to wit:

PLAINTIFFS FIRST INTERROGATORIES, REQUEST FOR PRODUCTION OF DOCUMENTS AND FIRST REQUESTS FOR ADMISSIONS

to the Attorneys for Elmore County, by the following method:

First Class Mail addressed to: yes._____.

Kirtian G. Naylor
Naylor & Hales, P.C.
950 W. Bannock Street, Ste 610
Boise, Idaho 83702

FAX: __X_____. yes____XX___.383-9516

E. Lee Schlender
Attorney for Plaintiff Nix

WorkCentre 7132
Transmission Report

G3 ID 2085870992 Date Time:06 17 2013:12:09PM
Page:1 (Last Page)

Local Name E. Lee Schlender
Logo

Document has been sent.
Document Size 8.5*11"SEF

E. LEE SCHLENDER
Schlender law offices
2700 Holly Lynn Drive
Mountain Home, Idaho 83647
Idaho Bar #1171/Washington Bar#36891
208-587-1688
leeschlender@gmail.com

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

Vs.

ELMORE COUNTY,

Defendant.

Case No. __CV-2013-1218

Plaintiff's First Interrogatories, Request for Production of Documents and First Request for Admissions

WILL YOU PLEASE TAKE NOTICE that Plaintiff herein requests Defendant above named to answer the following interrogatories within thirty days from the date of service herein in conformance with all provisions of Rule 33 of the Idaho Rules of Civil Procedure.

In answering these interrogatories, furnish all information available to you including information in the possession of you and your attorneys, investigators, experts, etc., retained by you and your attorneys (not merely information known of

First Discovery NIX V. ELMORE COUNTY JUNE 18, 2013 1

Exhibit B

Total Pages Scanned: 15 Total Pages Sent : 15

No.	Doc.	Remote Station	Start Time	Duration	Pages		Mode	Contents	Status
1	0514	Fax	6-17;12:04PM	4m30s	15	15	G3		CP

Note:
RE: Resend MB: Send to Mailbox BC: Broadcast MP: Multi Polling RV: Remote Service
PG: Polling RB: Relay Broadcast RS: Relay Send BF: Box Fax Forward CP: Completed
SA: Send Again EN: Engaged AS: Auto Send TM: Terminated

Nix Affidavit of August 6, 2013
Exhibit B,
Plaintiff's First Interrogatories,
Request for Production of Documents and Request for Admissions
June 18, 2013. ; fax confirmation of service.

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
Attorneys at Law
950 W. Bannock Street, Suite 610
Boise, ID 83702
Telephone No. (208) 383-9511
Facsimile No. (208) 383-9516
Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO,

Defendant.

Case No. CV-2012-1213

NOTICE OF SERVICE RE: DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

COMES NOW the above-named Defendant, by and through undersigned counsel, pursuant to Rule 36(c)(2) of the Idaho Rules of Civil Procedure, and hereby gives notice to all parties and counsel of record that Defendant's Responses to Plaintiff's First Request for Admissions were served upon Plaintiff's counsel.

DATED this 8th day of August, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender
2700 Holly Lynn Dr.
Mountain Home, ID 83647
Plaintiff's Attorney

X U.S. Mail
___ Hand Delivered
___ Email: leeschlender@gmail.com
X Fax: 587-3535

_____
Bruce J. Castleton

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_11 NOS, Def's Responses to Plf's 1st RFA.wpd

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
Attorneys at Law
950 W. Bannock Street, Suite 610
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Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **ORDER DENYING PLAINTIFF'S MOTION FOR STAY: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT I.R.C.P. 56(f)**

Currently pending before the Court is Plaintiff's Motion for Stay: Defendant's Motion for Summary Judgment I.R.C.P. 56(f). Having carefully reviewed the record and otherwise being fully advised, the Court hereby denies the Plaintiff's motion, for the reasons stated in oral argument during the hearing of August 5, 2013.

ORDER

IT IS SO ORDERED that the Plaintiff's Motion for Stay: Defendant's Motion for Summary Judgment I.R.C. P. 56(f) is DENIED.

DATED this 15th day of August, 2013.

LYNN G. NORTON
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of August, 2013, I caused to be served, by United States Mail, a true and correct copy of the foregoing upon:

E. Lee Schlender
2700 Holly Lynn Dr.
Mountain Home, ID 83647
Plaintiff's Attorney

Kirtlan G. Naylor
Bruce J. Castleton
Naylor & Hales, P.C.
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Defendant's Attorney

BARBARA STEELE
ELMORE COUNTY CLERK

By _____
Deputy Clerk

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_17 (proposed) Order Denying Plf's Rule 56(f) Motion.wpd

ORDER DENYING PLAINTIFF'S MOTION FOR STAY:
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT I.R.C.P. 56(f) - 3.

45

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BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
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Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO,

Defendant.

Case No. CV-2012-1213

STIPULATION FOR PROTECTIVE ORDER

Currently pending before the Court is the parties' Stipulation for Protective Order. Having carefully reviewed the record and otherwise being fully advised, the Court hereby adopts the parties' agreement.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, by and through their respective undersigned counsel, that, subject to the approval of the Court, a Protective Order shall issue in this action regarding the production of certain documents and information. The aforementioned information and documents may contain information or documentation which is

subject to confidentiality agreements with third parties; or it may constitute confidential and/or sensitive financial or personal information, and other sensitive or proprietary information. The parties desire that the confidential nature of all such material be protected by virtue of designating such material as confidential and restricting its dissemination. This Stipulation is without prejudice to any party moving the Court for different or additional protection for specified documents or categories of documents.

DEFINITIONS

1. As used in this Stipulation,

a. "Designating Party" means any Person who designates Material as Confidential Material.

b. "Discovering Counsel" means counsel of record for a Discovering Party.

c. "Discovering Party" means the Party to whom Material is being Provided by a Producing Party.

d. "Confidential Material" means any material designated as CONFIDENTIAL in accordance with the terms of this Stipulation.

e. "Material" means any document, testimony or information in any form or medium whatsoever, including without limitation any written or printed matter and electronic records provided in this action by a Party before or after the date of this Stipulation.

f. "Party" means the parties to this action, their attorneys of record and their agents, and subpoenaed, non-parties.

g. "Person" means any individual, corporation, partnership, unincorporated association, governmental agency, or other business or governmental entity, whether a Party or not.

h. "Producing Party" means any Person who Provides Material during the course of this action.

i. "Provide" means to produce any Material, whether voluntarily or involuntarily, whether pursuant to request or process, and whether in accordance with the Idaho or Federal Rules of Civil Procedure or otherwise.

CONFIDENTIAL DESIGNATION

2. A Producing Party may designate as "CONFIDENTIAL" any material provided to a Party which the Producing Party in good faith believes contains or discloses any of the following:

a. Confidential and/or sensitive personal or personnel information, personnel files; and

b. Information that the Parties to this action agree is Confidential.

3. A Producing Party shall stamp as CONFIDENTIAL all Materials which the Producing Party in good faith believes is entitled to protection pursuant to the standards set forth herein. A Producing Party may designate Confidential Material for Protection under this Stipulation by any of the following methods:

a. By identifying the Material with reasonable specificity before permitting the Discovering Counsel to inspect it or copy it;

b. By physically marking each page of protected Materials "CONFIDENTIAL" prior to Providing it to a Party; or

c. By identifying with specificity in writing to the Discovering Party any previously Provided Material which was not designated as CONFIDENTIAL prior to it having been Provided. For purposes of this method of designation, it will be a sufficiently specific identification to refer to the Bates numbers or deposition page numbers of previously Provided Material. Where a Producing Party designates previously Provided Material as Confidential Material pursuant to this subparagraph, the Producing Party will follow the procedures set forth in the previous subparagraph for designating Confidential Material. For previously Provided Material which was not designated as Confidential Material at the time of its being provided, this Stipulation shall apply to such materials beginning on the date that the Producing Party makes such designation.

RESTRICTION ON USE OF CONFIDENTIAL MATERIAL

4. Confidential Material shall not be disclosed, nor shall its contents be disclosed, to any person other than those described in paragraph 7 of this Stipulation and other than in accordance with the terms, conditions and restrictions of this Stipulation. The Parties agree that they will not use any Material provided in this action for any purpose other than this action.

5. Confidential Material Provided by a Producing Party to a Discovering Party shall not be used by the Discovering Party or anyone other than the Producing Party, specifically including the persons identified in paragraph 7, for any purpose, including without limitation any personal, business, governmental, commercial, or litigation (administrative or judicial) purpose, other than the prosecution or defense of this action.

6. All Confidential Material shall be kept secure by Discovering Counsel and access to Confidential Material shall be limited to persons authorized pursuant to paragraph 7 of this Stipulation.

7. For purposes of the preparation of this action, and subject to the terms, conditions, and restrictions of this Stipulation, Discovering Counsel may disclose Material designated as CONFIDENTIAL and the contents of Material designated as CONFIDENTIAL only to the following persons:

a. The parties and counsel of record working on this action on behalf of any party and counsel's employees who are directly participating in this action, including counsel's partners, associates, paralegals, assistants, secretaries, and clerical staff;

b. Court reporters and their staff;

c. The Court and any Person employed by the Court whose duties require access to Confidential Material;

d. Witnesses at depositions, pre-trial and trial proceedings, in accordance with the procedures set forth in paragraphs 8-11 hereof;

e. Expert witnesses upon the expert witnesses' execution of a written acknowledgment to be bound by this Stipulation as provided for in the form attached hereto as **Exhibit A**;

f. Non-party experts, consultants and investigators assisting counsel with respect to this action, and their secretarial, technical and clerical employees, including copy services, who are actively assisting in the preparation of this action, in accordance with the procedures set forth in paragraphs 9-11 hereof;

g. Officers, directors and employees of the Parties who have a need to review Confidential Material to assist in connection with this litigation, subject to the limitations set forth herein;

h. Photocopy service personnel who photocopied or assisted in the photocopying or delivering of documents in this litigation;

i. Any Person identified on the face of any such Confidential Material as an author or recipient thereof; and

j. Any Person who is determined to have been an author and/or previous recipient of the Confidential Material, but is not identified on the face thereof, provided there is prior testimony of actual authorship or receipt of the Confidential Material by such Person.

The Parties shall make a good faith effort to limit dissemination of Confidential Material within these categories to Persons who have a reasonable need for access thereto. The Parties do not intend for this Stipulation for Protective Order to govern the court procedures relating to the introduction of evidence proposed to be admitted at trial, or to govern the Court's determination as to the admissibility of evidence at trial. Rather, the Parties agree that such procedures and questions of admissibility at trial will be governed by normal court procedure and applicable rules of evidence, with the added agreement that either party may request the Court to take certain action with respect to any confidential substance of any piece of evidence proposed to be admitted at trial to preserve the confidential nature of that substance to the extent possible. The Parties agree that the ultimate decision as to any such request rests with the Court.

DEPOSITIONS/PRETRIAL/TRIAL PROCEEDINGS

8. Those portions of testimony where any Confidential Material is used or inquired into may not be conducted in the presence of any Person(s) other than (a) the deposition witness, (b) his or her counsel, and (c) Persons authorized to view such Confidential Material under paragraph 7 of this Stipulation.

9. Counsel for any deponent may designate testimony or exhibits as Confidential Material by indicating on the record at the deposition that the testimony of the deponent or any exhibits to his or her testimony are to be treated as Confidential Material. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential–Subject to Protection Pursuant to Court Order." Counsel for any Party may designate exhibits in which that Party has a cognizable interest as Confidential Material by indicating on the record that such exhibits are to be treated as Confidential Material. Failure of counsel to designate testimony or exhibits as confidential, however, shall not constitute a waiver of the protected status of the testimony or exhibits. For purposes of this paragraph 9, this Stipulation shall be deemed "effective" on the date on which it has been executed by all counsel for the Parties.

10. When Material disclosed is designated Confidential Material at the time testimony is given, the reporter shall separately transcribe those portions of the testimony so designated, shall mark the face of the transcript in accordance with paragraph 9 above, and shall maintain that portion of the transcript or exhibits in separate files marked to designate the confidentiality of their contents. For convenience, if a deposition transcript or exhibit contains repeated references to Confidential

Material which cannot conveniently be segregated from non-confidential material, any Party may request that the entire transcript or exhibit be maintained by the reporter as Confidential Material.

USE OF CONFIDENTIAL MATERIAL IN PLEADINGS AND OTHER COURT PAPERS

11. If any Party files with the Court any pleading, interrogatory, answer, affidavit, motion, brief, or other paper containing, appending, summarizing, excerpting or otherwise embodying Confidential Material, the pleading or other paper in which the Confidential Material is embodied shall be filed and maintained under seal and shall not be available for public inspection. The Party making the filing shall be responsible for filing the pleading or other paper in a sealed envelope, with a cover sheet stating:

> CONFIDENTIAL – this document is subject to a PROTECTIVE ORDER in *Nix v. Elmore County* (Idaho Fourth Judicial District Court, Elmore County Case No. CV-2012-1213) and may not be examined or copied except by the Parties, their respective counsel of record, or by Court Order.

OBJECTIONS TO DESIGNATION

12. Any Party may at any time notify the Designating Party in writing of its contention that specified Material designated as Confidential Material is not properly so designated because such Material does not meet the standards set forth in paragraph 2 of this Stipulation. The Designating Party shall, within five (5) court days, meet and confer in good faith with the Party challenging the designation in an attempt to resolve such dispute. The Challenging Party shall have twenty (20) calendar days from the conclusion of the meet and confer to file a motion challenging the designation of the Material in question. If no motion is filed within that 20-day period, or any mutually agreed to extension of time, all Parties shall treat the Material as designated. If a motion

challenging the designation is filed, the Designating Party must show by a preponderance of the evidence that there is good cause for the designation as Confidential Material. Pending resolution of any motion filed pursuant to this paragraph, all Persons bound by this Stipulation shall continue to treat the Material that is the subject of the motion as Confidential Material.

RETURN OF MATERIAL

13. Within ninety (90) calendar days after the final settlement or termination of this action, Discovering Counsel, and counsel for all clients receiving service of Confidential Materials as required by the Idaho Rules of Civil Procedure, shall return or destroy (at the option and expense of Producing Counsel) all Materials provided by a Producing Party and all copies thereof except to the extent that any of the foregoing includes or reflects Discovering Counsel's work product, and except to the extent that such Material has been filed with a court in which proceedings related to this action are being conducted. In addition, with respect to any such retained work product and unless otherwise agreed to, at the conclusion of this action, counsel for each Party shall store in a secure area all work product which embodies Confidential Material, and shall not make use of such Material except in connection with any action arising directly out of this action, or pursuant to a court order for good cause shown. The obligation of this Stipulation shall survive the termination of this action. To the extent that Confidential Materials are, or become, known to the public through no fault or action of the Discovering Party, or counsel for any party receiving service of Confidential Materials as required by the Idaho Rules of Civil Procedure, such Confidential Materials shall no longer be subject to the terms of this Stipulation. Upon request, counsel for each Party shall verify in writing that they have complied with the provisions of this paragraph.

SCOPE OF THIS STIPULATION

14. Counsel agree to meet and confer concerning the details of the use and treatment of Confidential Material at trial so as to agree upon the measures to be employed to carry out the intent of this agreement.

15. Nothing in this Stipulation shall be deemed to limit, prejudice, or waive any right of any Party or Person (a) to resist or compel discovery with respect to, or to seek to obtain additional or different protection for, Material claimed to be protected work product or privileged under Idaho or federal law, Material as to which the Producing Party claims a legal obligation not to disclose, or Material not required to be provided pursuant to federal or Idaho law; (b) to seek to modify or obtain relief from any aspect of this Stipulation; (c) to object to the use, relevance, or admissibility at trial or otherwise of any Material, whether or not designated in whole or in part as Confidential Material governed by this Stipulation; or (d) otherwise to require that discovery be conducted according to governing laws and rules.

16. Designation on the face of Material as Confidential Material shall have no effect on the authenticity or admissibility of such Material at trial.

17. This Stipulation shall not preclude any Person from waiving the applicability of this Stipulation with respect to any Confidential Material Provided by that Person or using any Confidential Material Provided by that Person or using any Confidential Material owned by that Person in any manner that Person deems appropriate.

18. This Stipulation shall not affect any contractual, statutory or other legal obligation or the rights of any Party or Person with respect to Confidential Material designated by that Party.

19. If at any time any Confidential Material protected by this Stipulation is subpoenaed from the Discovering Party by any Court, administrative or legislative body, or is requested by any other Person or entity purporting to have authority to require the production of such material, the Party to whom the subpoena or other request is directed shall immediately give written notice thereof to the Producing Party with respect to the Confidential Material sought, and shall afford the Producing Party at least five (5) business days to pursue formal objections to such disclosures.

SUBMISSION TO COURT

20. The Parties agree to submit this Stipulation to the Court for adoption as an order of the Court.

21. The Parties reserve the right to seek, upon good cause, modification of this Stipulation by the Court.

E. LEE SCHLENDER LAW OFFICES

By _____
E. Lee Schlender
Attorney for Plaintiff

Dated 8-14-2013

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton
Attorneys for Defendant

Dated 8/14/13

Exh. A-Expert Witness Acknowledgment

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_16 Stipulation for Protective Order (Rev 8-14-13).wpd

EXPERT WITNESS ACKNOWLEDGMENT OF STIPULATED PROTECTIVE ORDER

I, _____, acknowledge that I have read the Stipulated Protective Order entered in this action, *Nix v. Elmore County*, Elmore County Case No. CV-2012-1213. I understand the terms of the Stipulated Protective Order, and I agree to be bound by it. I further understand that a violation of this Stipulated Protective Order may be punishable as a contempt of court.

Dated: _____

_____

[Signature]

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_16 Stipulation for Protective Order-Exhibit A (8-9-13).wpd

EXHIBIT A

47

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2013 AUG 20 PM 12:45
BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
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Boise, ID 83702
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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX,

Plaintiff,

vs.

ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO,

Defendant.

Case No. CV-2012-1213

ORDER RE: STIPULATION FOR PROTECTIVE ORDER

Currently pending before the Court is the parties' Stipulation for Protective Order. Having carefully reviewed the record and otherwise being fully advised, the Court hereby adopts the parties' agreement.

ORDER

IT IS SO ORDERED that the parties' Stipulation for Protective Order is ADOPTED in full and this Protective Order incorporates that Stipulation and the parties are hereby ordered to abide by it.

DATED this 19th day of August, 2013.

LYNN G. NORTON
District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2013, I caused to be served, by United States Mail, a true and correct copy of the foregoing upon:

E. Lee Schlender
2700 Holly Lynn Dr.
Mountain Home, ID 83647
Plaintiff's Attorney

Kirtlan G. Naylor
Bruce J. Castleton
Naylor & Hales, P.C.
950 W. Bannock Street, Ste. 610
Boise, ID 83702
Defendant's Attorney

BARBARA STEELE
ELMORE COUNTY CLERK

By _____
Deputy Clerk

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_16 Stipulation for Protective Order-proposed Order (8-9-13).wpd

Kirtlan G. Naylor [ISB No. 3569]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
Attorneys at Law
950 W. Bannock Street, Suite 610
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Telephone No. (208) 383-9511
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Email: kirt@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **AFFIDAVIT OF BRUCE J. CASTLETON IN SUPPORT OF DEFENDANT'S MOTION TO WITHDRAW AND AMEND REQUESTS FOR ADMISSION**

STATE OF IDAHO)
)ss.
County of Elmore)

I, BRUCE J. CASTLETON, having been duly sworn do hereby depose and say as follows:

1. I am counsel for Elmore County in the current matter, and I have personal knowledge as to proceedings of this matter.

2. Plaintiff served upon Defendant, on June 17, 2013, and via fax, her First Interrogatories, Request for Production of Document and First Request for Admissions.

3. Upon receiving Plaintiff's discovery requests, I calendared a deadline to respond to these using the date July 17, 2013, plus an additional three (3) days because the requests were faxed to our law offices by Plaintiff's counsel. These additional three (3) days were based on Rule 6(d) of the Federal Rules of Civil Procedure, which allows for an additional three (3) days for facsimile service. Upon reviewing Plaintiff's Affidavit RE: Opposing Motion for Summary Judgment; Admitted Requests for Admission, I reviewed Rule 36(a) of the Idaho Rules of Civil Procedure and saw that this rule does not include service by facsimile in allowing the additional three (3) days. The original thirty (30) day deadline would have been July 17, 2013, however I interpreted the thirty-three (33) day deadline calculation as being July 20, 2013, which falling on a Saturday, would extend the deadline to July 22, 2013, pursuant to I.R.C.P. 6(a).

4. Based on my understanding of the deadline, Defendant filed a Motion for Protective Order on July 22, 2013, which I believed was timely with the discovery deadline, stating in part that Plaintiff's requested discovery would be of unnecessary cost and effort to Defendant with Defendant's pending motion for summary judgment.

5. To this end, and to avoid unnecessary cost and effort to Defendant in gathering the discovery requested by Plaintiff, Defendant waited until the determination of its pending motion for protective order before performing any more discovery.

6. At the oral argument of the hearing on August 6, 2013, both motions were argued. In his argument to stay Defendant's motion for summary judgment, plaintiff's counsel did

not mention any untimeliness of Defendant's responses to its previously filed discovery, nor that Plaintiff considered the filed requests for admissions to be, in fact, admitted at that time.

7. This Court issued an oral ruling from the bench that denied both motions, and so at that point, Defendant considered that its deadline to respond to Plaintiff's discovery would be extended to some reasonable time after this Court issued its written order denying its motion for protective order.

8. On August 7, 2013, plaintiff's counsel agreed to a ten (10) day deadline to respond to his previously filed discovery via email.

9. Defense counsel received Plaintiff's Affidavit RE: Opposing Motion for Summary Judgment; Admitted Requests for Admissions, via U.S. Mail on August 7, 2013. Upon realizing that Plaintiff had immediately deemed the prior requests for admissions actually admitted under I.R.C.P. 36(a), Defendant served its Responses to Plaintiff's Requests for Admission to Plaintiff on August 8, 2013 via fax and U.S. Mail. A true and accurate copy of Defendant's Responses to Plaintiff's Requests for Admission are attached hereto as Exhibit A.

10. Defendant served its Responses to Plaintiff's First Interrogatories and Request for Production of Document on Plaintiff on August 19, 2013, via U.S. Mail and fax.

///

///

DATED this 23rd day of August, 2013.

Bruce J. Castleton

SUBSCRIBED AND SWORN TO before me this 23rd day of August, 2013.

TRICIA J. WASSMUTH NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: 8/4/17

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy copy: Honorable Lynn G. Norton lnorton@adaweb.net; hfurst@elmorecounty.org	☒ Via email
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	✓ U.S. Mail ___ Federal Express ___ Email: leeschlender@gmail.com ✓ Facsimile: 587-3535

Bruce J. Castleton

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Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS**

COMES NOW the above-named Defendant, Elmore County, by and through its attorney of record, the law firm of Naylor & Hales, P.C., pursuant to Rules 33, 34 and 36(c)(2) of the Idaho Rules of Civil Procedure, and responds to Plaintiff's First Request for Admissions as follows:

EXHIBIT A

PRELIMINARY NOTE

Defendant has not yet completed discovery in this matter and therefore does not possess complete information at the present time. Defendant reserves the right to supplement or amend any or all of the answers/responses contained herein once it has had an opportunity to complete discovery regarding the matters referred to in Plaintiff's First Request for Admissions.

PLAINTIFFS FIRST REQUEST FOR ADMISSIONS

FIRST REQUEST FOR ADMISSION NO. 1. Admit that Plaintiff did not sign any document approved and authorized by the Elmore County Commissioners, stating that she understood and/or agreed that the Elmore County Policy Manual was not a guarantee of any particular length or term of employment.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 2. Admit that only an appointed, elected official of Elmore County or a politic body of such elected officials, has the authority to change or alter any provision of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 3. Admit that only the Elmore County Commissioners have the authority to provide an interpretation of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, in the event any provision thereof is deemed to be ambiguous.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 4. Admit that the Elmore County Commissioners did not by any specific ruling, decision or order state prior to June 2012 that Plaintiff was at the time of her termination on probation in accordance with that section of the ECPP entitled "Employee Classification, compensation and Benefits", sub-section B. Probationary Period; all as found on page 14 of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 5. Admit that Elmore County's Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, can be changed only after notifying elected officials and at the discretion of the Board of County Commissioners.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 6. Admit that no [sic] neither Mr. Vence Parsons or any other supervisor of Plaintiff notified in writing, any elected official of Elmore County of any Elmore County personnel policy change regarding Plaintiff, prior to her termination of employment. If you deny this request, provide a copy of any such notification.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 7. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A places limitations on the reasons an employee may be discharged and terminated.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 8. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A contains all of the causes related to performance of job duties or other violations of the policy as grounds for termination, adopted or ordered by the Elmore County Commissioners prior to the Plaintiff's termination.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 9. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state that it is not part of any type of employment contract.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 10. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state in any provision thereof, that employees are at-will.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 11. Admit that Plaintiff did not sign any agreement between her and the Elmore County Commissioners specifically stating that her employment could be terminated without cause at any time.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 12. Admit that no supervisor of Plaintiff had vested authority to change the status of Plaintiff from that of a full-time employee. If denied, provide a copy

of the decision, policy or order of the Elmore County Commissioners granting that authority to any supervisor.

RESPONSE: Deny. See Affidavit of Barbara Steele dated March 4, 2013, Ex. A, p. 33: "The following actions include some but not all the disciplinary steps which may be taken by the supervisor in response to personnel policy violations . . . c. Suspension with or without pay. d. Demotion. e. Probation. f. Dismissal." (emphasis added)

REQUEST FOR ADMISSION NO. 13. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A is the only policy document of Elmore County stating the reasons for which Plaintiff could be terminated and/or discharged.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 14. Admit that in no employee of Elmore County has in the past twenty years been terminated and/or discharged for any reason other than those stated in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Pursuant to I.R.C.P. 36(a), Defendant at this time has made reasonable inquiry into the admission requested and the information known and readily available is insufficient for Defendant to be able to admit or deny at this time.

REQUEST FOR ADMISSION NO. 15. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state in any provision thereof, that employees may be terminated without cause.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 16. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A does not state that employees may be terminated at any time for reasons not stated in that document.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 17. Admit that plaintiff had a property interest in her employment regardless of any contractual right created by the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 18. Admit that it is the contention of Elmore County in this case that unless Plaintiff was hired pursuant to a contract, her employment was at-will.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 19. Admit that prior to the month of June 2012, no elected official of Elmore County advised Plaintiff orally or in writing that she was an employee at-will.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 20. Admit that plaintiff was a full time employee of Elmore County at the time of her termination.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 21. Admit that plaintiff's probationary period ordered by her supervisor Vence Parsons on February 1, 2012 was for a disciplinary reason.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 22. Admit that plaintiff successfully completed her first hire probationary period one year after the calendar year 2007 in which she was hired.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 23. Admit that Vence Parsons was without authority to change, modify or establish any employment policy of Elmore County.

RESPONSE: Admit only that Mr. Parsons is without authority to change, modify, or establish any employment policy of the Elmore County Personnel Policy.

REQUEST FOR ADMISSION NO. 24. Admit that only the Elmore County Commissioners have the authority to change the terms and conditions of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A, which must be by an express writing.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 25. Admit that only the Elmore County Commissioners have the authority to interpret the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A with respect to the reasons for employee termination.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 26. Admit that Vence Parsons had no vested authority to change the status of Plaintiff from a full time employee as defined in the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

EXHIBIT A

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 27. Admit that Vence Parsons at no time between 2010 and this date, was an elected official of Elmore County.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 28. Admit that Vence Parsons in 2012 was at all times relevant to this action, an employee of Elmore County and subject to the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 29. Admit that the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A contains no statement other than in the paragraph discussing the introductory period of employment, that employees can be discharged for any reason or at any time, without cause.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 30. Admit that no employee of Elmore County including supervisors, have the authority to resolve for any employment issue, any express or implied ambiguity in The Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 31. Admit that Plaintiff was not advised of her at will status as an employee, other than by those notifications authored by Vence Parsons, her supervisor.

RESPONSE: Deny.

REQUEST FOR ADMISSION NO. 32. Admit that Elmore County has represented to the United States District Court for the District of Idaho in Sommer v. Elmore County, et al Case 1:11-cv-00291-REB that:

> "The only limitation on the at-will employment relationship is that full-time regular and part-time regular employees may request a pre-deprivation appeal hearing before termination. This hearing is available to regular employees."

RESPONSE: Admit that statement was made in that case, but deny Plaintiff's characterization of the statement and use without full context.

REQUEST FOR ADMISSION NO. 33. Admit that after serving her initial first-hire probationary period, Plaintiff was a full-time employee in accordance with the employee classification system provided by the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 34. Admit that the Elmore County Commissioners did not by an official act, change the employment status of Plaintiff from being a full-time employee, until date of her termination.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 35. Admit that no act by an elected official of Elmore County changed the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A. regarding the classification of employees as full-time or otherwise, between January 1, 2013 and the date of plaintiffs termination of employment.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 36. Admit that employees placed on disciplinary probation as per the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A are not automatically re-classified as not being full-time employees.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 37. Admit that full-time employees placed on disciplinary probationary status are not first-hire employees subject to the probationary period stated on Pages 14 and 15 of the Elmore County Personnel Policy attached to the affidavit of Barbara Steele dated March 4, 2013 as Exhibit A.

RESPONSE: Deny.

DATED this 8th day of August, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

E. Lee Schlender
2700 Holly Lynn Dr.
Mountain Home, ID 83647
Plaintiff's Attorney

X U.S. Mail
__ Hand Delivered
__ Email: leeschlender@gmail.com
X Fax: 587-3535

Bruce J. Castleton

M:\ICRMP\Nix v. Elmore County\Pleadings\8712_11 Def's Responses to Plf's 1st RFA.wpd

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS - 11.

EXHIBIT A

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FILED

2013 AUG 23 PM 1:02

BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
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Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MOTION FOR WITHDRAWAL AND AMENDMENT OF ADMISSIONS**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., pursuant to Idaho Rule of Civil Procedure 36(b), hereby requests the Court order withdrawal of any deemed admissions as alleged in Plaintiff's Affidavit RE: Opposing Motion for Summary Judgment; Admitted Requests for Admissions, and to allow Defendant to amend its responses pursuant to Defendants's Responses to Plaintiff's Requests for Admission to Plaintiff, dated August 8, 2013 (as attached to the Affidavit of Bruce J. Castleton, filed concurrently). This motion is supported by the

ORIGINAL

pleadings and documents on file and Defendant's Memorandum in Support of Motion for Withdrawal and Amendment of Admissions and the Affidavit of Bruce J. Castleton in Support of Defendant's Motion for Withdrawal and Amendment of Admissions, filed concurrently.

DATED this 23rd day of August, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy Copy: Hon. Lynn G. Norton District Court Judge Fourth Judicial District	☒	Email: lnorton@adaweb.net; hfurst@elmorecounty.org
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	X ___ ___ X	U.S. Mail Federal Express Email: leeschlender@gmail.com Facsimile: 587-3535

_____
Bruce J. Castleton

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FILED

2013 AUG 23 PM 1:02

BARBARA STEELE
CLERK OF THE COURT
DEPUTY

Kirtlan G. Naylor [ISB No. 3569]
Bruce J. Castleton [ISB No. 6915]
Jacob H. Naylor [ISB No. 8474]
NAYLOR & HALES, P.C.
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Email: kirt@naylorhales.com; bjc@naylorhales.com; jake@naylorhales.com

Attorneys for Defendant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR WITHDRAWAL AND AMENDMENT OF ADMISSIONS**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Memorandum in Support of Motion for Withdrawal and Amendment of Admissions pursuant to I.R.C.P. Rule 36(b).

ORIGINAL

I.

PROCEDURAL BACKGROUND

Currently pending before this Court is Defendant's Motion for Summary Judgment, filed on June 25th, 2013. In opposition to Defendant's motion for summary judgment, Plaintiff filed "Plaintiff's Affidavit RE: Opposing Motion for Summary Judgment; Admitted Requests for Admissions," on August 6th, 2013. (hereinafter, "Plaintiff's Affidavit RE: Admitted Requests for Admissions") In this affidavit, Plaintiff asserts that Defendants failed to respond to her Request for Admission, served on June 17th, 2013, within the 30 day time period required in I.R.C.P. 36(a). (Plaintiff's Affidavit RE: Admitted Requests for Admissions, p. 1) This deadline would have been July 17th, 2013. (Affidavit of Bruce J. Castleton In Support of Defendant's Motion to Withdraw and Amend Requests for Admission, ¶ 3; hereinafter, "Castleton Aff.") However, defense counsel included an additional three days to the deadline for responding to these requests for admission based on Fed. R. Civ. P. 6(d). (Castleton Aff., ¶ 3) The 33 day deadline calculation would have been July 20th, 2013, which falling on a Saturday, would extend the deadline to July 22nd, 2013 pursuant to I.R.C.P. 6(a). Accordingly, Defendant filed a Motion for Protective Order on July 22nd, 2013, which it believed was timely with the discovery deadline, stating in part that Plaintiff's requested discovery would incur unnecessary cost and effort to Defendant with Defendant's pending motion for summary judgment. (Castleton Aff., ¶ 4) Plaintiff had also filed a motion to stay Defendant's summary judgment pending discovery.

At the oral argument of the hearing on August 6th, 2013, both motions were argued. (Castleton Aff., ¶ 6) In his argument to stay Defendant's motion for summary judgment, plaintiff's

counsel did not mention any untimeliness of Defendant's responses to its previously filed discovery, nor that Plaintiff considered the filed requests for admissions to be, in fact, admitted at that time. (*Id.*) This would have, assumably, been relevant information with respect to Defendant's motion for a protective order prohibiting all discovery until after resolution of the motion for summary judgment. Regardless, this Court issued an oral ruling from the bench that denied both motions, and so at that point, Defendant considered that its deadline to respond to Plaintiff's discovery would continue to some reasonable time after this Court issued its written order denying its motion for protective order. (Castleton Aff., ¶ 7)

On the same day as the August 6th, 2013 hearing, Plaintiff filed her Affidavit RE: Admitted Requests for Admissions, and effected service upon Defendants by U.S. Mail. The next day, plaintiff's counsel agreed to a 10 day deadline to respond to his previous discovery. (Castleton Aff., ¶ 8) However, upon later receiving Plaintiff's Affidavit RE: Admitted Requests for Admissions on August 7th, 2013, and realizing that Plaintiff had deemed the prior requests for admissions actually admitted, Defendant served its Responses to Plaintiff's Requests for Admission to Plaintiff on August 8th, 2013 via fax and U.S. Mail. (Castleton Aff., ¶ 9) It is worth noting that of the 37 requests for admission originally propounded, Defendants admitted almost two-thirds of them. (See Castleton Aff., Ex. A)

Defendant now comes before this Court requesting that either the Court determine the requests for admission not admitted pursuant to Defendant's then pending motion for protective order and any reasonable extension of the discovery deadline pursuant to that pending motion, or in the alternative, should the Court deem Plaintiff's requests for admissions actually admitted, that it

exercise its discretion in allowing Defendant to withdraw those admissions and amend them pursuant to I.R.C.P. 36(b) with those served upon Plaintiff on August 8th, 2013.

II.

ARGUMENT

The issue as to whether allow withdrawal or amendment of an admission is a matter of discretion. I.R.C.P. 36(b); *Quiring v. Quiring*, 130 Idaho 560, 564 (1997). In addition, there are two requirements as set forth in I.R.C.P. 36(b) to allow withdrawal or amendment: 1) presentation of the merits must be promoted, and 2) the party who obtains the admission must not be prejudiced by the withdrawal. *Id.* In the promotion of hearing the case upon its merits, when "upholding the admissions would practically eliminate any presentation of the merits of the case," the first requirement of I.R.C.P. 36(b) is satisfied. *Id.*, quoting *Hadley v. United States*, 45 F.3d 1345, 1348 (1995).

The party who obtains the omissions, the Plaintiff in this instance, then has the burden to demonstrate prejudice from the withdrawal and/or amendment. I.R.C.P. 36(b). However, Plaintiff must show more than that they will now have to affirmatively prove the elements previously admitted. I.R.C.P. 36(b) requires that she demonstrate that the prejudice arises in the difficulty of proving those elements, "because of the sudden need to obtain evidence with respect to the questions previously deemed admitted." *Quiring*, 130 Idaho at 564; quoting *Hadley*, 45 F.3d at 1348 (further citations omitted). The Idaho Supreme Court noted that the unavailability of key witness could be such a showing of appropriate prejudice, and cited with approval Ninth Circuit case law stating the general rule that a "high level of reliance on the admissions" would be required to show appropriate

prejudice. *Id.* It did note, that "where the motion for withdrawal is not made until the middle of the trial, prejudice has been found." *Id.*

In *Quiring*, supra, the Idaho Supreme Court failed to find requisite prejudice when the request to have the untimely answered admissions be admitted was made on the first day of trial. *Quiring*, 130 Idaho at 565. There, the party obtaining the admissions represented to the trial court that he had prepared his trial strategy based on the untimely responses of the opposing party. *Id.* In its holding, the Supreme Court stated that prejudice was not demonstrated "due to the unavailability of key witnesses or any other commensurate burden." *Id.* Additionally, in *Vannoy v. Uniroyal Tire Co.*, the Idaho Supreme Court also upheld the granting of a motion to "discard" unanswered admissions right before trial because "statements in depositions and interrogatories set out plaintiffs' positions which adequately denied the substance of the requests for admissions submitted by the association." 111 Idaho 536, 545 (1985).

In the current action before this Court, to prohibit the withdrawal and amendment of these admissions as found in Plaintiff's affidavit would eliminate the presentation of the merits of the case. For example, Plaintiff's Request for Admission No. 7 as admitted states, "The Elmore County Personnel Policy places limitations on the reasons an employee may be discharged and terminated." To admit this statement would automatically place the Elmore County Personnel Policy in the position of a binding contractual employment agreement which would indicate that Plaintiff is no longer an at-will employee. Thus, Defendant would not have the legal ability to end the employment relationship at any time without incurring liability, and any further evidence produced by Defendant to the contrary would be effectively futile.

Plaintiff's Request for Admission No. 9, if admitted, is actually in direct contravention to the factual record as already established in this case. It would read, "The Elmore County Personnel Policy does not state that it is not part of any type of employment contract." When in fact, as already recognized by this Court, the Policy reads:

> **THIS PERSONNEL POLICY IS NOT A CONTRACT. NO CONTRACT OF EMPLOYMENT WITH ELMORE COUNTY WILL BE VALID UNLESS IT IS SIGNED IN ACCORDANCE WITH PROPER PROCEDURES BY A SPECIFICALLY AUTHORIZED REPRESENTATIVE OF THE GOVERNING BOARD AND UNLESS IT IS SIGNED AND CONTAINS THE NAME OF THE EMPLOYEE WHO WOULD BE BENEFITTED BY THE CONTRACT.**

(Aff. of Barbara Steele, Ex. A, p. 7) (emphasis in original) To allow this admission would not only preclude Defendant's argument that the Personnel Policy is not a contract, but would be absurd in the face of the established factual record.

Plaintiff's Request for Admission No. 17, as admitted, would state, "Plaintiff had a property interest in her employment regardless of any contractual right created by the Elmore County Personnel Policy." Again, to allow this admission would indicate that Plaintiff was not an at-will employee without allowing Defendant an opportunity to provide any evidence to the contrary, and that would preclude one of Defendant's main legal defenses, as already argued during Plaintiff's Partial Motion for Summary Judgment. Especially seeing as this "property interest," is undefined or identified, Defendant would be left without any ability to know even what kind of evidence to present in order to rebut this admission.

Plaintiff's Requests for Admission Nos. 12 and 26 effectively would establish that the actions taken by Plaintiff's supervisor, Vence Parsons, were unauthorized and by extension, that Plaintiff's

entire termination was an invalid act. To allow such an admission would effectively end Defendant's case in that if Plaintiff's termination itself was invalid, then there would be no evidence that Defendant would be able to produce in order to rebut this fact. This admission is also directly in contravention to the Elmore County Personnel Policy, which clearly gives a supervisor the authority to terminate employees. (See Affidavit of Barbara Steele dated March 4, 2013, Ex. A, p. 33)

Based on the previously cited requests for admission, were they admitted, there would effectively be no hearing of this case on the merits. Allowing admission without withdrawal and amendment would contradict the factual record, contradict the prior argument of Defendants, and create confusion at trial as Defendant would have somehow admitted that Plaintiff had a "property interest" in her employment, without being able to articulate or defend against that undefined interest.

It is also highly unlikely that Plaintiff will be able to establish sufficient prejudice to her case from Defendant's withdrawal and amendment of these admissions. Primarily, Plaintiff had Defendant's actual responses to her Requests for Admissions just two days after filing her Affidavit RE: Admitted Requests for Admissions. In addition, Defendant has admitted 24 of the 37 requests, so these admissions would obviously not prejudice Plaintiff, and would still be applicable in the pending motion for summary judgment. Discovery in this case is still ongoing, and so Plaintiff can still obtain any necessary evidence required to meet her evidentiary burden. Defendant has already responded to Plaintiff's interrogatories and requests for production, which seem to be further attempts to factually support her requests for admission. (Castleton Aff., ¶ 10) In other words, continuing discovery will allow Plaintiff to obtain the appropriate evidence she seeks in order to

have a jury determine the merits of her purported requests for admissions. There is no indication that based on Defendant's untimely responses, that Plaintiff will be able to demonstrate prejudice from withdrawal and amendment that would satisfy I.R.C.P. 36(b), as interpreted by *Quiring* and *Vannoy*, supra.

III.

CONCLUSION

Based on the above argument, Defendant requests that this Court allow withdrawal of any of Plaintiff's Requests for Admissions which are deemed admitted at this time, and allow the amendment of Defendant's Responses to Plaintiff's First Request For Admissions, as attached to the Affidavit of Bruce Castleton (filed concurrently) and previously served upon Plaintiff.

DATED this 23rd day of August, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy Copy: Hon. Lynn G. Norton District Court Judge Fourth Judicial District	☒	Email: lnorton@adaweb.net; hfurst@elmorecounty.org
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	X ___ ___ X	U.S. Mail Federal Express Email: leeschlender@gmail.com Facsimile: 587-3535

Bruce J. Castleton

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Reply Memorandum in Support of Summary Judgment.

In response to Defendant's Motion for Summary Judgment, Plaintiff filed "Plaintiff's Affidavit RE: Opposing Motion for Summary Judgment; Admitted Requests for Admissions," (herein after, "Plaintiff's Opp. Aff.") on August 6, 2013. In doing so, she alleges that pursuant to I.R.C.P. 36(a), her previously served Requests for Admissions should be deemed admitted and that,

"the Admitted Requests for Admissions established law and facts sufficient to deny the Motion for Summary Judgment filed herein and enter judgment for me on all issues of liability." (Plaintiff's Opp. Aff., ¶ 6.) As discussed more fully in Defendant's Motion to Withdraw and Amend Admissions, filed on August 23, 2013, Defendant seeks to amend these allegedly deemed admissions pursuant to Idaho case law allowing the same in order to determine this case by the merits and because there is no prejudice to Defendant in amending these admissions. Should this motion be granted, there would be no issue of material fact that would preclude granting summary judgment to Defendant as a matter of law. However, even should these admissions remain, the majority of them have no consequence on the legal basis behind Defendant's Motion for Summary Judgment and as such, summary judgment should be granted and this case dismissed.

ARGUMENT

Defendant's summary judgment motion argues simply that this Court has previously ruled that Plaintiff failed to set forth any genuine issue of material fact as to any contractual nature of her employment, and denied her partial summary judgment motion regarding claims of wrongful termination and breach of the covenant of good faith and fair dealing as a matter of law as Plaintiff was an at-will employee. (See Memorandum Decision and Order Denying Plaintiff's Motion for Partial Summary Judgment, April 15, 2013, pp. 5, 8; hereinafter "April 15, 2013 Memorandum and Order.") Therefore, Plaintiff's at-will employment status is a legal determination previously made by this Court, and is controlling in the current Motion for Summary Judgment.

Primarily, and as argued in Defendant's Motion for Summary Judgment, it is important to note that following this Court's Memorandum Decision and Order the Plaintiff filed two motions–a Motion for I.A.R. Rule 12(b) Permissive Appeal and a Motion for I.R.C.P. Rule 54(b)

Certification–asking this Court to allow an appeal of the Memorandum Decision. In Plaintiff's written Motion for Rule 54(b) Certification, counsel stated:

> PLAINTIFF CERTIFIES THAT THERE ARE NO ISSUES OF FACT TO BE RAISED OR BROUGHT BEFORE THE COURT WITH RESPECT TO THESE ISSUE [sic] AND FINDINGS UPON FURTHER HEARING OR TRIAL.

(Motion for Rule 54(b) Certification, p. 2) (emphasis in original). Additionally, at oral argument on these motions, counsel for the Plaintiff stated multiple times that the facts upon which this Court relied in its Memorandum Decision are the facts of this case, and that there are no more facts for this Court to consider in addressing the issues of this case. Thus, Plaintiff is bound by the statements of counsel regarding the state of the facts of this case. *See Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 109 (2009) (holding "it is generally accepted that the relationship between an attorney and client is one of agency in which the client is the principal and the attorney is the agent" and the client "is bound by counsel's actions"); *Eby v. State*, 148 Idaho 731, 736-737 (2010) (holding "[g]enerally, parties are bound by the actions (and failures to act) of their attorneys"). Plaintiff should not now, when facing summary judgment, be able to assert further factual discovery as Defendant has relied on the prior statements of her counsel that the facts were established.

Should the Court grant Defendant's Motion to Withdraw and Amend Admissions, the remaining admissions that Defendant did admit are insufficient to withstand summary judgment. These admissions generally address the following:

1. There was no written contract or document between Plaintiff and Defendant, or statement in the ECPP, stating that she was an at-will employee. (Request for Admission Nos. 1, 10, 11, 15, 16, 18, and 29.)

2. Only the Elmore County Commissioners have the authority to change the ECPP and that it was not changed with respect to Plaintiff's employment.

(Request for Admission Nos. 2, 5, 6, 24, and 35.)

3. Clarification as to the statements of the Elmore County Commissioners regarding Plaintiff's employment status. (Request for Admission No. 4.)

4. Clarification as to the existence of any other policy documents from Defendant. (Request for Admission No. 13.)

5. Clarification as to Plaintiff's full-time probationary employment status. (Request for Admission Nos. 20-22, 33, 34, and 36.)

6. Clarification as to supervisor duties. (Request for Admission Nos. 23, 27, and 28.)

(See Affidavit of Bruce J. Castleton in Support of Defendant's Motion to Withdraw and Amend Requests for Admission, Ex. A.) These admissions are insufficient for Plaintiff to overcome the presumption that she was an at-will employee and, therefore, could be terminated at any time by Defendant. It is clear, though, that Plaintiff is attempting to manufacture an implied employment contract to manipulate Plaintiff's presumed at-will status to make her a for-cause employee. Plaintiff seems to oppose Defendant's Motion for Summary Judgment through an implied argument that she was not an at-will employee based solely on the history and previous practices of Defendant, which Idaho precedent has established as legally impermissible. She also seems to argue that the ECPP was somehow improperly modified or interpreted, which is immaterial to her termination as an at-will employee as this Court has established that the ECPP is not a contractual basis for her employment.

1. **Plaintiff has Failed To Contest Defendant's Summary Judgment Regarding Her Claims of Violation of the Idaho Protection of Employees Act and Public Policy Claims.**

Defendant's Motion for Summary Judgment argues that Plaintiff's allegations regarding a violation of the Idaho Protection of Employees Act was untimely pursuant to the statute of limitations, and that Plaintiff had failed to specify any public policy violation from her termination.

Plaintiff has failed to factually or legally contest these arguments. Thus, summary judgment is appropriate for Defendant in these uncontested allegations.

2. **Any Prior Facts Supporting Historical Precedent Supporting Alleged For Cause Terminations are Immaterial to Defendant's Motion for Summary Judgment.**

The Idaho Supreme Court has clearly stated that, "**An employer's custom of only terminating employees for good cause is likewise not sufficient to support a claim of an implied contract term eliminating the employer's right to terminate at will.**" *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 242 (2005) (emphasis added). Thus, although the allegedly deemed admissions would establish that "[n]o employee of Elmore County has in the past twenty years been terminated and/or discharged for any reason other than those stated in the Elmore County Personnel Policy," (Plaintiff's Opp. Aff., ¶ 14), this assertion does nothing to rebut the presumption that Plaintiff was an at-will employee of Defendant. This fact is insufficient to withstand summary judgment as a matter of law pursuant to firmly established Idaho law.

In *Jenkins*, *supra*, the plaintiff in that action attempted to argue exactly what Plaintiff is apparently attempting to argue here: that "salaried personnel in positions similar to [the plaintiff] were not normally discharged without cause," and thus he was a "for cause" employee. *Jenkins*, 141 Idaho at 241. The court there held that simply having a policy or procedure for terminating employees without cause "did not represent the idea that an employee could only be terminated for cause." *Id.* at 242. In fact, the court cited to a specific policy basis for why such an interpretation of the Idaho at-will presumption of employment was essential: to find to the contrary would imply that an employer would be in a position where it would be in its self-interest to abandon its pro-employee policies, such as indiscriminately firing employees for no cause in order to maintain its

employees' at-will status. *Id.* This is why the *Jenkins* court made clear that "an employer may provide guidelines, which are necessary conditions for continued employment, and avoid having them read as a guarantee for a specified term of employment or placing limits on the reasons for discharge." *Id.* (emphasis added.) As discussed previously before this Court, the ECPP is simply a general policy statement favoring employees.

As this Court has previously held, Plaintiff was an at-will employee of Defendant because she had not presented any admissible evidence to show "she had a contract to be employed for a specified time or which limits the reason(s) she may be terminated." (April 15, 2013 Memorandum and Order, p. 4) (emphasis added). None of Plaintiff's alleged admissions, even if considered as admitted, satisfy that prior deficiency. In Idaho, the presumption is that employment is at-will unless an employee is hired pursuant to a contract that specifies the duration of employment or limits the reasons for which an employee may be terminated. *See Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 387 (Idaho 2005). Plaintiff, however, seeks to establish "for cause" status not from the existence of a contract to rebut the at-will presumption, but rather from the lack of a statement or rule from Defendant explicitly stating that she was "at-will." (See Plaintiff's Opp. Aff., ¶¶ 1, 7, 8, 10, 11, 13-15, 18, 19, and 31.) Her intent is to apparently show that she was an implied "for cause" employee simply by virtue of an alleged historical precedent for only terminating employees "for cause," which argument has been directly rejected by the Idaho Supreme Court.

Defendant's Personnel Policy sets forth pro-employee conditions of employment that generally encourage positive employee relations. The disclaimers and statements in the ECPP indicate that it is intended to be a general statement of policy, not a contract. Idaho precedent, along with this Court's own prior holding, is clear: a policy must indicate an intent that it become part of

the employment agreement to have contractual force and to overcome the presumption of at-will employment. Where, as here, there is contract disclaimer language specifically negating such intent, the at-will presumption stands. Summary judgment is therefore appropriate for Defendant.

3. Any Alleged Change or Interpretation of the ECPP Manual is Immaterial to Defendant's Motion for Summary Judgment.

This Court has previously held as a matter of law that Defendant's Personnel Policy was not "intended to create enforceable contract rights," and that there was no material issue of fact the ECPP did not constitute an employment contract for Plaintiff. (April 15, 2013 Memorandum and Order, p. 5.) Again, Plaintiff has provided no evidence to the contrary, even with her allegedly deemed admissions, that would correct that prior deficiency. Based on Plaintiff's Opp. Aff., Plaintiff assumably will argue that her supervisor's actions in terminating her were some sort of alleged unauthorized change, modification, or interpretation of the ECPP. This is a moot point, however, because there is no preliminary contractual basis for the ECPP to have such authority. The final analysis, which remains unrebutted by Plaintiff's evidence in the record, is that she was an at-will employee without any other employment contract, and Defendant could terminate the employment relationship at any time.

Even though the ECPP is clearly without contractual authority, this Court did note in its prior decision that the provisions of the ECPP needed to be followed in good faith to satisfy the implied covenant of good faith and fair dealing. (April 15, 2013 Memorandum and Order, p. 6-8.) There is no new evidence to rebut this Court's prior holding that Plaintiff has failed to show an issue of material fact exists that the Defendant breached this covenant. Regardless of Plaintiff's currently alleged admissions, Plaintiff has already admitted by affidavit in her prior partial Motion for

Summary Judgment that the Elmore County Board of County Commissioners ratified her placement on probationary status and maintaining her at-will employment status in February 2012 and subsequent termination through a written decision issued June 18, 2012. (Nix Affidavit Supporting Motion for Partial Summary Judgment, ¶ 11.) In the course of that confirmation, the County Commissioners specifically noted that Plaintiff had probationary employee status at the time of her termination. (See *Id.*, Ex. I.) They also specifically note, without qualification, that Mr. Parsons placed Plaintiff on probation in February 2012. (*Id.*) As Plaintiff's own evidence already indicates that the Board of County Commissioners reviewed and confirmed all actions leading up to Plaintiff's termination, including actions of her supervisor, Mr. Parsons, it is unclear how evidence that the ECPP prohibits a supervisor from placing an employee on probationary status and maintaining her at-will status would even exist, seeing as the Board of County Commissioners themselves confirmed the very act of placing Plaintiff on probationary status prior to her termination, and the termination itself.

Further, this Court has already held that Plaintiff's supervisor "followed the policy requiring notice prior to discipline which could, and did, include placing her on probationary status as set out on page 33 of Exhibit A to the Steele Affidavit." (April 15, 2013 Memorandum and Order, p. 8.) A plain reading of the ECPP, which has been previously established by this Court, states clearly that a supervisor has specific authority to impose discipline upon employees, including both placing employees on probationary status or even terminating their employment. (Affidavit of Barbara Steele, Ex. A, pp. 32-33.) Thus, Mr. Parsons followed the policy as written which allowed both placing Plaintiff on probationary status and ultimately terminating her employment. These actions were subsequently confirmed by the Board of County Commissioners. Thus, summary judgment

is appropriate for Defendant because there is no evidence that Defendant deviated from the employment policies found in the ECPP in bad faith.

4. **Even if This Court Deems Plaintiff's Requests for Admissions to Be Admitted, Summary Judgment is Still Appropriate for Defendant.**

Even assuming that this Court deems the requests for admissions admitted, the Plaintiff has still not met her burden to establish either an issue of material fact or a legal basis by which summary judgment is improper for Defendant. In Plaintiff's Opp. Aff., she attempts to create a new factual basis upon which to avoid summary judgment through her requests for admissions. However, the allegedly deemed admissions do not address the lack of an employment contract between Plaintiff and Defendant. In fact, they only further confirm that no evidence of any written contract between Plaintiff and Defendant exists. (See Plaintiff's Opp. Aff., ¶¶ 1, 11, and 18.) There is no further evidence presented by Plaintiff that would indicate that there is any written or implied contract between Plaintiff and Defendant, and so without a contract, Plaintiff remained an at-will employee of Defendant.

These admissions also attempt to indicate that Mr. Parsons, as Plaintiff's supervisor, acted outside the authority established by the ECPP. (See Plaintiff's Opp. Aff., ¶¶ 12, 23, 25-28, 30, 31.) However, as argued above, the plain language of the ECPP gives an employee's supervisor express authority to place an employee on probation or to terminate them.

Finally, the admissions attempt to make broad and undefined legal conclusions in a desperate attempt to avoid summary judgment. For example, Plaintiff attempts to simply state that she "had a property interest in her employment regardless of any contractual right created by the Elmore County Personnel Policy," presumably to make Plaintiff a "for cause" employee. (Plaintiff's Opp.

Aff., ¶ 17.) This conclusory statement, as an undefined, general assertion of a vague property interest, is an inappropriate attempt to create an issue of material fact and is insufficient to withstand summary judgment. See *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556 (2009). As an employee must have more than a "mere hope of continued employment" in order to have a property interest in employment in Idaho, it would follow that Plaintiff must have more than a mere conclusory statement as basis for some property right's existence. *See Harkness v. City of Burley*, 110 Idaho 353, 356 (1986). Even more paradoxical is that Plaintiff alleges that this property interest is "regardless of any contractual right created by the Elmore County Personnel Policy." (Plaintiff's Opp. Aff., ¶ 17.) However, the only basis for any and all Plaintiff's alleged due process claims stems directly from the ECPP, and specifically, its mention of an appeal hearing to full-time regular employees. If this property interest does not come from the ECPP, it must come from "ordinance, or by implied contract." See *Bishop v. Wood*, 426 U.S. 341, 344 (1976). There is no evidence of either in this case, and there is no factual basis in the record for Plaintiff's property interest, and as such, she cannot avoid summary judgment.

CONCLUSION

For the reasons stated above, Defendant Owyhee County respectfully requests this Court GRANT Defendant's Motion for Summary Judgment and DISMISS Plaintiff's Complaint in full.

DATED this 28th day of August, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy copy: Honorable Lynn G. Norton lnorton@adaweb.net; hfurst@elmorecounty.org	☒ Via email
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	_x_ U.S. Mail ___ Federal Express ___ Email: leeschlender@gmail.com _x_ Facsimile: 587-3535

Bruce J. Castleton

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

CHERRI NIX, Plaintiff, vs. ELMORE COUNTY A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, Defendant.	Case No. CV-2012-1213 **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR WITHDRAWAL AND AMENDMENT OF ADMISSIONS**

Defendant Elmore County, by and through its attorneys of record, Naylor & Hales, P.C., hereby submits its Reply Memorandum in Support of Motion for Withdrawal and Amendment of Admissions pursuant to I.R.C.P. Rule 36(b).

I.
ARGUMENT

A. Defendant's Motion to Withdraw and Amend Admissions is Timely.

Pursuant to I.R.C.P. 7(b)(3), Defendant filed and served its Motion to Withdraw and Amend Admissions on August 23, 2013, which was 14 days before the hearing date for this motion on September 6, 2013. Plaintiff has argued that this motion and its accompanying affidavit are untimely because it was not filed pursuant to the summary judgment deadlines found in I.R.C.P. 56. Plaintiff's argument is without merit. There is no Idaho Rule of Civil Procedure which applies the deadlines found in I.R.C.P. 56 to any other motions brought before the Court. In fact, that would be in direct contradiction to I.R.C.P. 7(b)(3), which provides deadlines for all other motions, affidavits, and briefing. Defendant has argued its Motion for Summary Judgment considering that this separate Motion to Withdraw and Amend may or may not be granted in the Court's discretion, but the Motion to Withdraw and Amend is not a motion for summary judgment and, therefore, the deadlines of I.R.C.P. 56(c) are inapplicable.

It is also unclear from Plaintiff's argument how exactly she is applying I.R.C.P. 56 to the current motion. Based on the continued hearing date for the Motion for Summary Judgment on September 6, 2013, the 28 day deadline for Defendant to submit the motion, affidavit, and supporting brief for its Motion for Summary Judgment was August 9, 2013. Defendant filed and served its initial motion and supporting brief on June 25, 2013, which was timely. Plaintiff now argues that at the hearing on August 6, 2013, this Court "advised that as per Rule 56(c) the responses to Request for Admissions and other discovery had expired with the passed deadline of 28 days as per Rule 56."

This argument is inconsistent even with I.R.C.P. 56(c) as the deadline to be applied to Defendant's Motion for Summary Judgment was actually August 9, 2013.

B. Defendant has Satisfied the Two-Prong Test of I.R.C.P. 36(b) to Allow this Court to Consider Withdrawal and Amendment of Admissions.

Defendant has always recognized that the issue as to whether to allow withdrawal or amendment of an admission is a matter of discretion for this Court. I.R.C.P. 36(b); *Quiring v. Quiring*, 130 Idaho 560, 564 (1997). However, when the Idaho Supreme Court has addressed this issue, it has stated that it is an abuse of the trial court's discretion if it makes a decision on a motion to withdraw and amend admissions without analysis of the two-prong requirements in I.R.C.P. 36(b). *First Federal Savings Bank of Twin Falls v. Riedesel Engineering, Inc.*, 154 Idaho 626, 636 (2012). This rule allows withdrawal and amendment to preserve the presentation of the merits of the case and where there is a lack of substantial prejudice against the party who obtained the admissions *Id.*, quoting *Hadley v. United States*, 45 F.3d 1345, 1348 (1995).

While Plaintiff argues that "a deciding factor regarding withdrawal of admissions is whether the party simply made a mistake of time computation or a clerical error," this statement is not founded on any Idaho case law. In fact, while the Idaho Supreme Court has noted the reasoning or timing behind a failure to respond in its holdings, these have been secondary factors and the court has still allowed withdrawal and admissions when there has been no specific finding noted regarding the reasons behind the original failure to respond to the opposing party's request for admissions. Neither has the Idaho Supreme Court ever discussed or analyzed a "pattern of neglect and knowing not being diligent" as a singular, determinative factor in its holdings regarding withdrawal of

admissions. Rather, the Idaho Supreme Court has specifically adhered to the two-prong analysis in I.R.C.P. 36(b) in its analysis regarding similar motions.

In fact, Plaintiff has cited to *First Federal Savings Bank of Twin Falls v. Riedesel Engineering, Inc.*, supra, where the Idaho Supreme Court held it was an abuse of discretion to deny a withdrawal of admission when the trial court failed to recognize and address the two-prong factor test of I.R.C.P. 36(b).[1] In that case, the admission was made by plaintiff's counsel on January 22, 2010, and the motion for withdrawal was not made until May 3, 2010, after the plaintiff had already been denied summary judgment twice. *First Federal Savings*, 154 Idaho at 635. Notwithstanding these facts, the Supreme Court held that not allowing the withdrawal of the admission was an abuse of the trial court's discretion. *Id.* at 637. It is noted that withdrawing the admission would "promote 'the overriding policy to have issues between litigants decided on the merits.'" *Id.* at 636, *quoting Bauscher Grain v. Nat'l Sur. Corp.*, 92 Idaho 229, 231 (1968). It is also noted that there was no claim that withdrawal of the admission would cause undue delay or additional discovery in violation of a discover order. *Id.* Thus, contrary to Plaintiff's current argument, the Idaho Supreme Court has taken a highly permissive view on allowing the withdrawal and amendment of admissions.

In considering the two-prong I.R.C.P. 36(b) factors, Plaintiff has not shown how the admission of her unanswered requests for admissions would not be determinative of this case. In her memorandum, she has addressed two admissions cited by Defendant as being controlling to the

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[1]In this case, the admission at issue was an oral representation of counsel in open court, but the Idaho Supreme Court concluded that the analysis was "conceptually no different from a motion to withdraw an admission made under Rule 36 of the Idaho Rules of Civil Procedure," and analyzed the issue pursuant to I.R.C.P. 36 case law. *First Federal Savings*, 154 Idaho at 637.

merits of this case, and ignores the remainder. Via their amended responses to Plaintiff's Requests for Admission (Castleton Aff., Ex. A), there are 14 amended responses.

Primarily, Plaintiff argues that it would not be a controlling legal issue were Defendant to admit Request for Admission No. 7, which would admit that the "Elmore County Personnel Policy places limitations on the reasons an employee may be discharged or terminated." She appears to ignore long standing Idaho employment law stating that if there are contractual limitations on the reasons an employee may be terminated, then they are no longer a presumed at-will employee, but are instead a for-cause employee. *See Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 387 (Idaho 2005). In similar manner, Request for Admission No. 8, which states that the ECPP "contains all causes related to performance of job duties or other violations of the policy as grounds for termination," and Request for Admission No. 14, which states that no employee has been terminated for reasons other than in the ECPP, would also implicate the ECPP as an implied contractual limitation on an employee's status. Therefore, if Defendant were to admit, via these admissions, that the ECPP places limitations on the reasons an employee may be discharged or terminated, and that it contains all the causes for grounds for termination, it would be effectively allowing Plaintiff to avoid the presumption of at-will employment status and, as such, Plaintiff could argue her termination was facially invalid, thus negating any determination on the merits as to whether her termination was in fact, valid.

Likewise, were Defendant to admit Plaintiff's Request for Admission No. 17, it would be admitting that Plaintiff had a property right in her employment. Based on long standing employment law, when an employee has a property right in their employment, that employee is no longer

presumed to be an at-will employee and is instead is for cause. *See Lawson v. Umatilla County*, 139 F.3d 690, 691-92 (9th Cir. 1998) (citing *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir.1993)). Similar to the analysis above, were this admitted by Defendant, Plaintiff could then argue that her at-will termination was facially invalid due to her for-cause employment status and seek damages accordingly.

Plaintiff's Request for Admission No. 9, would admit that the ECPP does not contain a disclaimer of contractual intent. Therefore, pursuant to Idaho case law, Plaintiff would be allowed to argue that without the disclaimer of contractual intent, the ECPP is actually an implied contractual provision of her employment, and that she had a contractual expectation in the policies of that agreement. *See Mitchell v. Zilog, Inc.*, 125 Idaho 709, 712-13 (1994). Not only would this be determinative as to the status of the ECPP as an implied contractual term, but it would be in direct contradiction to the established factual record, as already argued.

Plaintiff's Requests for Admission Nos. 3, 12, 25, 26, and 30 effectively would establish that the actions taken by Plaintiff's supervisor, Vence Parsons, were unauthorized by the ECPP, and would allow Plaintiff to argue her entire termination as an invalid act. To allow such an admission would effectively end Defendant's case in that if it were admitted that Plaintiff's termination itself was invalid, then there would be no evidence that Defendant would be able to produce in order to rebut this fact. This admission is also directly in contravention to the ECPP, which clearly gives a supervisor the authority to terminate employees, and does not have any provision regarding the interpretation of the ECPP by a supervisor. (See Affidavit of Barbara Steele dated March 4, 2013, Ex. A, p. 33.)

Again, were these requests for admission deemed admitted, the ultimate effect would be that Plaintiff would be considered a for-cause employee based on both the ECPP and some undefined yet admitted property interest, with the ECPP providing implied contractual terms to her employment agreement, and that her supervisor violated the ECPP in effecting her termination. Thus, there would be no hearing of the case on the merits of her at-will employment status, the non-contractual nature of the ECPP, or the validity of her termination. As argued above, this would also be in contradiction to the factual record already established in this case, and would lead to an inconsistent result for other cases regarding similar circumstances actually determined on the merits.

In addition, Plaintiff has failed to demonstrate the prejudice required by I.R.C.P. 36(b) in order to preclude this Court from exercising its discretion in granting withdrawal and amendment of the admissions. Plaintiff has argued that she will be prejudiced in "the need to present evidence to establish all of the facts," in those admitted admissions. (Plaintiff's Memorandum: Request for Admissions, p. 6) The Idaho Supreme Court has already clearly established that this alone is insufficient to demonstrate prejudice, but that there must be some difficulty in proving these facts based on the high reliance on the admissions and "due to the unavailability of key witnesses or any other commensurate burden." *Quiring*, 130 Idaho at 564-65.

Plaintiff has also argued that "there is insufficient time to complete discovery regarding these issues with the trial date fast approaching and Defendant not remotely responding to outstanding discovery in a meaningful manner." (Plaintiff's Memorandum: Request for Admissions, p. 6.) Defendant does not understand how the trial date currently set in this case for December 3-6, 2013, is insufficient time to complete any discovery. From the date of the hearing on the Motion to

Withdraw and Amend Admissions, three months still remain. Initially, on August 19, 2013, Defendant provided its discovery responses before this Court filed the stipulated protective order on August 20, 2013. Therefore, its objection stating that it would supplement its response when there was a protective order in place was valid. Further, Defendant has already provided Plaintiff with most all the discovery documents requested in her First Requests for Interrogatories and Requests for Production. Plaintiff still has more than sufficient time to file any discovery motion she feels appropriate. Plaintiff has not demonstrated the prejudice required in I.R.C.P. 36(b) to preclude this Court from exercising its discretion in allowing withdrawal and amendment of Defendant's admissions.

Plaintiff also makes the argument that to withdraw the admissions that Defendant concedes would waste the Court's and Plaintiff's time, therefore causing prejudice. As Defendant has also moved to amend the admissions, which would include the admission of those conceded, Defendant does not understand how allowing withdrawal and amendment of the admissions would waste any time or resources. Plaintiff would not be required to prove these amended admissions again because they are, already, admitted.

C. Plaintiff's Cited Cases are Distinguishable to the Current Motion.

The majority of the cases that are cited in Plaintiff's briefing are inapplicable to Defendant's motion to withdraw and amend its admissions. The case that Plaintiff cites to in her support for her proposition that the reasoning behind a failure to respond to request for admissions is a "deciding factor," *Deloge v. Cortez*, 131 Idaho 201 (1998), is inapplicable to the current case because there the party seeking withdrawal had never even attempted to file a motion to withdraw and amend

admissions, and gave no explanation for the failure to respond and after being granted two extensions to file discovery responses. In other words, the trial court never had an opportunity to exercise its discretion pursuant to I.R.C.P. 36(b) because counsel never requested it. The Supreme Court noted this, in stating that the admissions were deemed admitted as a matter of law, and without any I.R.C.P. 36(b) motion to withdraw before them, there was no error by the district court in allowing them to be admitted. *Id.* In the present case, Defendant has filed a timely motion to withdraw and amend its response to Plaintiff's request for admissions pursuant to I.R.C.P. 36(b).

Contrary to Plaintiff's argument, Defendant has never alleged to this Court that its responses to Plaintiff's requests for admission were timely. (See Plaintiff Memorandum: Withdrawal of Admissions, p. 2.) Instead, Defendant stated that it believed the original motion for protective order was timely pursuant to its application of the three-day I.R.C.P. 6(d) extension. (Castleton Aff., ¶ 4.) Upon the denial of the protective order, and upon the basis that Defendant sought the protective order to avoid a waste of resources in having to gather and provide 10 years' worth of discovery evidence, it thought to have a reasonable time to respond to Plaintiff's discovery requests, which would have been presumably negotiated with Plaintiff's counsel after the denial of the protective order. However, as Plaintiff had filed her opposition affidavit deeming those requests for admissions admitted on the same day as the hearing and denial of the protective order, this did not occur.

Plaintiff's counsel did, however, allow ten days for Defendant to produce responses to other discovery after the denial of the protective order. In doing so, Plaintiff's counsel acknowledges that she provided these ten days on August 7, 2013. (Plaintiff's Memorandum: Request for Admissions, p. 2-3.) This would have led to a deadline of August 17, 2013, which was a Saturday. Pursuant to

I.R.C.P. 6(a), the discovery responses for interrogatories and requests for production provided to Plaintiff on August 19, 2013, the first Monday following August 17, 2013, were timely.

Plaintiff's other cited cases are similarly distinguishable from the current action in that their contexts (or jurisdictions) are inapplicable to the current action, when there is substantial and direct controlling Idaho case law:

- ***JPMorgan Chase Bank, N.A. v. Eldon*, 144 Conn. App. 260 (2013)**: The Connecticut Appellate Court found no error in denying plaintiff's motion for withdrawal and amendment of admissions when plaintiff did not move for withdrawal and amendment of admissions until one year after summary judgment was granted and thus, the merits of the case were already decided at the time of the motion. Also, plaintiff failed to request any sort of extension or amendment prior to the hearing on defendant's motion for summary judgment. Here, Defendant has moved for withdrawal and amendment, and has made its motion prior to any determination of the merits of the case.

- ***Young v. Smith*, 67 So.3d 732, 740 (Miss. 2011)**: The Mississippi Supreme Court held that it was not an abuse of discretion to deny withdrawal and amendment based on multiple factors, including the failure to respond to the original requests for admission until after summary judgment was filed and that the motion for withdrawal and amendment was filed seven-and-one-half years after the original requests were submitted. Here, Defendant has already submitted responses to Plaintiff and has moved to withdraw and amend the responses to the requests for admission, and has done so prior to a summary judgment determination.

- ***Precision Franchising, LLC v. Gatej*, 2012 WL 6161223 (E.D. Va. Dec. 11, 2012)**: The Eastern District of Virginia District Court, through interpretation of F.R.C.P. 36, found that it was not an abuse of discretion to deny withdrawal and amendment where defendant had not only failed to file a motion to withdraw and amend admissions, but also found prejudice where an untimely response to the request for admissions allowed plaintiff to rely upon those admissions for over two months past an already extended deadline to respond. Additionally, the defendant in that case had ignored orders to compel discovery issued by the court, and even after being admonished by the trial court judge, filed a unsatisfactory response. Here, Plaintiff was served with Defendant's responses to requests for admission and Defendant has already moved for withdrawal and amendment of admissions.

As these cases are either factually or legally distinguishable from Defendant's current motion, Plaintiff's reliance on them does not sufficiently support her opposition to Defendant's motion to withdraw and amend.

II.
CONCLUSION

Based on Defendant's argument and affidavit, Defendant renews its request that this Court allow withdrawal of any of Plaintiff's Requests for Admissions which are deemed admitted at this time, and allow the amendment of Defendant's Responses to Plaintiff's First Request For Admissions, as attached to the Affidavit of Bruce Castleton (filed previously) and previously served upon Plaintiff.

DATED this 4th day of September, 2013.

NAYLOR & HALES, P.C.

By _____
Bruce J. Castleton, Of the Firm
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of September, 2013, I caused to be served, by the method(s) indicated, a true and correct copy of the foregoing upon:

Courtesy Copy: Hon. Lynn G. Norton District Court Judge Fourth Judicial District	☒	Email: lnorton@adaweb.net; hfurst@elmorecounty.org
E. Lee Schlender 2700 Holly Lynn Dr. Mountain Home, ID 83647 *Plaintiff's Attorney*	___ ___ X X	U.S. Mail Federal Express Email: leeschlender@gmail.com Facsimile: 587-3535

Bruce J. Castleton

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PROCEED TO VOLUME III